NO. 2727

In the

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA MEXICAN GOLD MINING COMPANY,
a corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff in Error.

ALASKA DAILY EMPIRE PRESS

NO. 2727

In the

United States

Circuit Court of Appeals

For the Ninth Circuit

ALASKA MEXICAN GOLD MINING COMPANY,
a corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States
District Court for the District of
Alaska, Division No. 1.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff in Error.

ALASKA DAILY EMPIRE PRESS

STATEMENT OF FACTS.

This proceeding was brought by the Territory of Alaska against the Alaska Mexican Gold Mining Company to recover taxes alleged to be due under an act of the Territorial Legislature. It is a test case in that the payment of taxes by others similarly situated is delayed pending a decision herein.

On the 24th day of August, 1912, Congress passed the Organic Act of the erritory of Alaska, which is in words and figures as follows: (The pertinent portions are in italics.)

(PUBLIC—NO. 334.)
(H. R. 38.)

An Act to create a legislature in the Territory of Alaska, to confer legislative power thereon, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

ALASKA TERRITORY ORGANIZED.—That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall be and constitute the Territory of Alaska under the laws of the United States, the government of which shall be

organized and administered as provided by said laws.

SEC. 2. CAPITAL AT JUNEAU.—That the capital of the Territory of Alaska shall be at the city of Juneau, Alaska, and the seat of government shall be maintained there.

SEC. 3. CONSTITUTION AND LAWS OF UNITED STATES EXTENDED.—*That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature: Provided, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and*

support of insane persons in the District of Alaska, and for other purposes," approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. And the legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States.

SEC. 4. THE LEGISLATURE.—That the legislative power and authority of said Territory shall be vested in a legislature, which shall consist of a senate and house of representatives. The senate shall consist of eight members, two from each of the four judicial divisions into which Alaska is now divided by Act of Congress, each of whom shall have at the time of his election the qualifications of an elector in Alaska, and shall have been a resident and an inhabitant in the division from which he is elected for at least two years prior to the date of his election. The term of office of each member of the senate shall be four years: *Provided,* That immediately after they shall be assembled in consequence of the first election they shall, by lot or drawing, be divided in each division into two classes; the seats of the members of the first class shall be vacated at the end of two years and the seats of the members of the second class shall be vacated at the end of four years, so

organized and administered as provided by said laws.

SEC. 2. CAPITAL AT JUNEAU.—That the capital of the Territory of Alaska shall be at the city of Juneau, Alaska, and the seat of government shall be maintained there.

SEC. 3. CONSTITUTION AND LAWS OF UNITED STATES EXTENDED.—*That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature: Provided, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and*

support of insane persons in the District of Alaska, and for other purposes," approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. And the legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States.

SEC. 4. THE LEGISLATURE.—That the legislative power and authority of said Territory shall be vested in a legislature, which shall consist of a senate and house of representatives. The senate shall consist of eight members, two from each of the four judicial divisions into which Alaska is now divided by Act of Congress, each of whom shall have at the time of his election the qualifications of an elector in Alaska, and shall have been a resident and an inhabitant in the division from which he is elected for at least two years prior to the date of his election. The term of office of each member of the senate shall be four years: *Provided,* That immediately after they shall be assembled in consequence of the first election they shall, by lot or drawing, be divided in each division into two classes; the seats of the members of the first class shall be vacated at the end of two years and the seats of the members of the second class shall be vacated at the end of four years, so

that one member of the senate shall, after the first election, be elected bienially at the regular election from each division. The house of representatives shall consist of sixteen members, four from each of the four judicial divisions into which Alaska is now divided by Act of Congress. The term of office of each representative shall be for two years and each representative shall possess the same qualifications as are prescribed for members of the senate and the persons receiving the highest number of legal votes in each judicial division cast in said election for senator or representative shall be deemed and declared elected to such office: *Provided*, That in the event of a tie vote the candidates thus affected shall settle the question by lot. In case of a vacancy in either branch of the legislature the governor shall order an election to fill such vacancy, giving due and proper notice thereof. That each member of the legislature shall be paid by the United States the sum of fifteen dollars per day for each day's attendance while the legislature is in session, and mileage, in addition, at the rate of fifteen cents per mile for each mile from his home to the capital and return by the nearest traveled route.

SEC. 5. ELECTION OF MEMBERS OF THE LEGISLATURE.—That the first election for members of the Legislature of Alaska shall be held on the Tuesday next after the first Monday in November, nineteen hundred and twelve, and all subsequent elections for the election of such members shall be held on the

Tuesday next after the first Monday in November biennially thereafter; that the qualifications of electors, the regulations governing the creation of voting precincts, the appointment and qualifications of election officers, the supervision of elections, the giving of notices thereof, the forms of ballots, the register of votes, the challenging of voters, and the returns and the canvass of the returns of the result of all such elections for members of the legislature shall be the same as those prescribed in the Act of Congress entitled "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," approved May seventh, nineteen hundred and six, and all the provisions of said Act which are applicable are extended to said elections for members of the legislature, and shall govern the same, and the canvassing board created by said Act shall canvass the returns of such elections and issue certificates of eleciton to each member elected to the said legislature; and all the penal provisions contained in section fifteen of the said Act shall apply to elections for members of the legislature as fully as they now apply to elections for Delegate from Alaska to the House of Representatives.

SEC. 6. CONVENING AND SESSIONS OF LEGISLATURE.—*That the Legislature of Alaska shall convene at the capitol at the city of Juneau, Alaska, on the first Monday in March in the year nineteen hundred and thirteen, and on the first Monday in March*

every two years thereafter; but the said legislature shall not continue in session longer than sixty days in any two years unless again convened in extraordinary session by a proclamation of the governor, which shall set forth the object thereof and give at least thirty days' written notice to each member of said legislature, and in such case shall not continue in session longer than fifteen days. The governor of Alaska is hereby authorized to convene the legislature in extraordinary session for a period not exceeding fifteen days when requested to do so by the President of the Unitd States, or when any public danger or necessity may require it.

SEC. 7. ORGANIZATION OF THE LEGISLATURE.—That when the legislature shall convene under the law, the senate and house of representatives shall each organize by the election of one of their number as presiding officer, who shall be designated in the case of the senate as "president of the senate" and in the case of the house of representatives as "speaker of the house of representatives," and by the election by each body of the subordinate offices provided for in section eighteen hundred and sixty-one of the United States Revised Statutes of eighteen hundred and seventy-eight, and each of said subordinate officers shall receive the compensation provided in that section: *Provided*, That no person shall be employed for whom salary, wages, or compensation is not provided in the appropriation by Congress.

SEC. 8. ENACTING CLAUSE—SUBJECT OF ACT.

—That the enacting clause of all laws passed by the legislature shall be "Be it enacted by the Legislature of the Territory of Alaska." No law shall embrace more than one subject, which shall be expressed in its title.

SEC. 9. LEGISLATIVE POWER.—LIMITATIONS.—*The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents; nor shall the legislature grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the affirmative approval of Congress; nor shall the legislature pass local or special laws in any of the cases enumerated in the Act of July thirtieth, eighteen hundred and eighty-six; nor shall it grant private charters or special privileges,* but it may, by general act, permit persons to associate themselves together as bodies corporate for manufacturing, mining, agricultural, and other industrial pursuits, and for the conduct of business of insurance, savings banks, banks of discount and deposit (but not of issue), loans, trust, and guaranty associations, for the establishment and conduct of cemeteries, and for the construction and operation of railroads, wa-

gon roads, vessels, and irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association, but the authority embraced in this section shall only permit the organization of corporations or associations whose chief business shall be in the Territory of Alaska; no divorce shall be granted by the legislature, nor shall any divorce be granted by the courts of the Territory, unless the applicant therefor shall have resided in the Territory for two years next preceding the application, which residence and all causes for divroce shall be determined by the court upon evidence adduced in open court; nor shall any lottery or the sale of lottery tickets be allowed; nor shall the legislature or any municipality interfere with or attempt in anywise to limit the Acts of Congress to prevent and punish gambling, and all gambling implements shall be seized by the United States marshal or any of his deputies, or constable or police officer, and destroyed; nor shall spirituous or intoxicating liquors be manufactured or sold, except under such regulations and restrictions as Congress shall provide; nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the government, nor shall the Government of the Territory of Alaska or any polit-

ical or municipal corporation or subdivision of the Territory make any subscription to the capital stock of any incorporated company, or in any manner lend its credit for the use thereof; nor shall the Territory, or any municipal corporation therein, have power or authority to create or assume any bonded indebtedness whatever; nor to borrow money in the name of the Territory or of any municipal division thereof; nor to pledge the faith of the people of the same for any loan whatever, either directly or indirectly; nor to create, nor to assume, any indebtedness, except for the actual running expenses thereof; and no such indebtedness for actual running expenses shall be created or assumed in excess of the actual income of the Territory or municipality for that year, including as a part of such income appropriations then made by Congress and taxes levied and payable and applicable to the payment of such indebtedness and cash and other money credits on hand and applicable and not already pledged for prior indebtedness: *Provided*, That all authorized indebtedness shall be paid in the order of its creation, *all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof.* No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose, in excess

of two per centum of the assessed valuation of property within the town in any one year; *Provided*, That the Congress reserves the exclusive power for five years from the date of the approval of this Act to fix and impose any tax or taxes upon railways or railway property in Alaska, and no acts or laws passed by the Legislature of Alaska providing for a county form of government therein shall have any force or effect until it shall be submitted to and approved by the affirmative action of Congress; and all laws passed, or attempted to be passed, by such legislation in said Territory inconsistent with the provisions of this section shall be null and void: *Provided further*, That nothing herein contained shall be held to abridge the right of the legislature to modify the qualifications of electors by extending the elective franchise to women.

SEC. 10. RULES, QUORUM, AND MAJORITY.—That the senate and house of representatives shall each choose its own officers, determine the rules of its own procedings not inconsistent with this Act, and keep a journal of its proceedings; that the ayes and noes of the members of either house on any question shall, at the request of one-fifth of the members present, be entered upon the journal; that a majority of the members to which each house is entitled shall constitute a quorum of such house for the conduct of business, of which quorum a majority vote shall suffice; that a smaller number than a quorum may adjourn from day to day and compel the attend-

ance of absent members, in such manner and under such penalties as each house may provide; that for the purpose of ascertaining whether there is a quorum present the presiding officer shall count and report the actual number of members present.

SEC. 11. LEGISLATOR SHALL NOT HOLD OTHER OFFICE.—That no member of the legislature shall hold or be appointed to any office which has been created, or the salary or emoluments of which have been increased, while he was a member, during the term for which he was elected and for one year after the expiration of such term; and no person holding a commission or appointment under the United States shall be a member of the legislature or shall hold any office under the government of said Territory.

SEC. 12. EXEMPTIONS OF LEGISLATORS. — That no member of the legislature shall be held to answer before any other tribunal for any words uttered in the exercise of his legislative functions. That the members of the legislature shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during their attendance upon the sessions of the respective houses, and in going to and returning from the same: *Provided*, That such privilege as to going and returning shall not cover a period of more than ten days each way, except in the second division, when it shall extend to twenty days each way, and the fourth division to fifteen days each way.

SEC. 13. PASSAGE OF LAWS.—That a bill in order to become a law shall have three separate readings in each house, the final passage of which in each house shall be by a majority vote of all the members to which such house is entitled, taken by ayes and noes, and entered upon its journal. That every bill, when passed by the house in which it originated or in which amendments thereto shall have originated, shall immediately be enrolled and certified by the presiding officer and the clerk and sent to the other house for consideration.

SEC. 14. THE VETO POWER.—That, except as herein provided, all bills passed by the legislature shall, in order to be valid, be signed by the governor. That every bill which shall have passed the legislature shall be certified by the presiding officers and clerks of both houses, and shall thereupon be presented to the governor. If he approves it, he shall sign it and it shall become a law at the expiration of ninety days thereafter, unless sooner given effect by a two-thirds vote of said legislature. If the governor does not approve such bill, he may return it, with his objections, to the legislature. He may veto any specific item or items in any bill which appropriates money for specific purposes, but shall veto other bills, if at all, only as a whole. That upon the receipt of a veto message from the governor each house of the legislature shall enter the same at large upon its journal and proceed to reconsider such bill, or part of a bill, and again vote upon it by ayes and noes

which shall be entered upon its journal. If, after such reconsideration, such bill or part of a bill shall be approved by a two-thirds vote of all the members to which each house is entitled, it shall thereby become a law. That if the governor neither signs nor vetoes a bill within three days (Sundays excepted) after it is delivered to him, it shall become a law without his signature, unless the legislature adjourns sine die prior to the expiration of such three days. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature, by its adjournment, prevents the return of the bill, in which case it shall not be a law.

SEC. 15. PAYMENT OF LEGISLATIVE EXPENSES.—That their shall be annually appropriated by Congress a sum sufficient to pay the salaries of members and authorized employees of the Legislature of Alaska, the printing of the laws, and other incidental expenses thereof; the said sums shall be disbursed by the Governor of Alaska, under sole instructions from the Secretary of the Treasury, and he shall account quarterly to the Secretary for the manner in which the said funds shall have been expended; and no expenditure, to be paid out of money appropriated by Congress, shall be made by the governor or by the legislature for objects not authorized by the Acts of Congress making the appropriations, nor beyond the sums thus appropriated for such objects.

SEC. 16. LAWS TRANSMITTED TO PRESIDENT AND PRINTED.—That the Governor of Alaska shall, within ninety days after the close of each session of the Legislature of the Territory of Alaska, transmit a correct copy of all the laws and resolutions passed by the said legislature, certified to by the secretary of the Territory, with the seal of the Territory attached; one copy to the President of the United States; and one to the Secretary of State of the United States; and the legislature shall make provisions for printing the session laws and resolutions within ninety days after the close of each session and for their distribution to public officials and sale to the people of the Territory.

SEC. 17. ELECTION OF DELEGATES.—That after the year nineteen hundred and twelve the election for Delegate from the Territory of Alaska, provided by "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," approved May seventh, nineteen hundred and six, shall be held on the Tuesday after the first Monday in November, in the year nineteen hundred and fourteen, and every second year theafter on the said Tuesday next after the first Monday in November, and all of the provisions of the aforesaid Act shall continue to be in full force and effect and shall apply to the said election in every respect as is now provided for the election to be held in the month of August therein: *Provided*, That the time for holding an election in said Territory for Delegate in

Alaska to the House of Representatives to fill a vacancy, whether such vacancy is caused by failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by an act passed by the Legislature of the Territory of Alaska: *Provided further*, That when such election is held it shall be governed in every respect by the laws passed by Congress governing such election.

SEC. 18. CREATING RAILROAD COMMISSION.—That an officer of the Engineer Corps of the United States Army, a geologist in charge of the Alaska surveys, an officer in the Engineer Corps of the United States Navy, and a civil engineer who has had practical experience in railroad construction and has not been connected with any railroad enterprise in said Territory be appointed by the President as a commissions hereby authorized and instructed to conduct an examination into the transportation question in the Territory of Alaska; to examine railroad routes from the seaboard to the coal fields and to the interior and navigable waterways; to secure surveys and other information with respect to railroads, including cost of construction and operation; to obtain information in respect to the coal fields and their proximity to railroad routes; and to make report of the facts to Congress on or before the first day of December, nineteen hundred and twelve, or as soon thereafter as may be practicable, together with their conclusions and recommendations in respect to the

best and most available routes for railroads in Alaska which will develop the country and the resources thereof for the use of the people of the United States: *Provided further*, That the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated to defray the expenses of said commission.

SEC. 19. That the Committee on Territories of the Senate and the Committee on Territories of the House of Representatives are hereby authorized, empowered, and directed to jointly codify, compile, publish, and annotate all the laws of the United States applicable to the Territory of Alaska, and said committees are jointly authorized to employ such assistance as may be necessary for that purpose; and the sum of five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to cover the expenses of said work, which shall be paid upon vouchers properly signed and approved by the chairman of said committees.

SEC. 20. LAWS SHALL BE SUBMITTED TO CONGRESS.—That all laws passed by the Legislature of the Territory of Alaska shall be submitted to the Congress by the President of the United States, and, if disapproved by Congress, they shall be null and of no effect.

Approved, August 24, 1912.

On the 1st day of May, 1913, the Territorial Legislature for the Territory of Alaska passed an Act, which is as follows: (The pertinent portions are in italics.)

CHAPTER 52.
(H. B. No. 96.)

AN ACT to establish a system of taxation, Create Revenue, and Provide for Collection Thereof for the Territory of Alaska, and for other Purposes.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. *That any person or persons, corporation, or company prosecuting or attempting to prosecute any of the following lines of business within the Territory of Alaska, shall first apply for and obtain licese so to do from the district court or subdivision thereof in said Territory, and pay for said license for the respective lines of business and trades, as follows, to-wit:*

Fisheries: Salmon canneries, seven cents per case on sock-eye and king salmon; one half cent a case on hump-back, cohoe, or chum salmon.

Cold Storage Fish Plants: Doing a business of one hundred thousand dollars per annum, five hundred dollars per annum; doing a business of seventy-five thousand dollars per annum, three hundred and seventy five dollars per annum; doing a business of

fifty thousand dollars per annum, two hundred and fifty dollars per annum; doing a business of twenty-five thousand dollars per annum, one hundred and twenty-five dollars per annum; doing a business of ten thousand dollars per annum, fifty dollars per annum; doing a business of under ten thousand dollars per annum, twenty-five dollars per annum; doing a business of under four thousand dollars per annum, ten dollars per annum. The annual business of this section shall be considered the amount paid per annum for the product.

Laundries doing a business of more than five thousand dollars per annum, twenty-five dollars.

Meat Markets: Doing a business of more than five thousand dollars per annum and less than ten thousand dollars per annum, twenty-five dollars per annum; doing a business of more than ten thousand dollars per annum, fifty dollars per annum; doing a business of more than fifty thousand dollars per annum, seventy-five dollars per annum; doing a business of more than seventy-five thousand dollars per annum, three hundred and seventy-five dollars per annum; doing a business of more than one hundred thousand dollars per annum, five hundred dollars per annum.

Furs: One-half of one per cent. of the gross value of any furs, the product of Alaska, exported from the Territory and it shall be unlawful and punishable under this act for any person to ship from the Territory of Alaska any furs without having first

paid for and obtained a license permit as herein provided; and no custom officer shall issue a manifest for nor postmaster receipt for mailing any furs unless the shipper thereof shall present a certificate for this license fee signed by the clerk of the district court of the division in which the furs were shipped.

Telephone Companies: Doing a business of more than twenty-four hundred dollars per annum, one-half of one per cent. of the gross volume of business per annum over and above the sum of twenty-four hundred dollars.

Transient and Itinerant Merchants, two hundred dollars per annum.

Mining: One-half of one per cent. on net income over and above five thousand dollars per annum.

Insurance Companies: A tax shall be imposed on all premiums payable on risks in the Territory of Alaska of one per cent. of the amount of such premiums.

1. In the case of such insurance premiums being paid to companies not licensed to do business in the Territory of Alaska, mutual's or Lloyd's, such tax shall be payable by the insured;

2. In case of premiums paid to companies licensed and doing business in the Territory of Alaska; such tax shall be payable by the company receiving the same.

Express Companies: Express companies to pay one per cent. of the business done by said express

companies in the Territory of Alaska per annum.

Lighterage Companies: Ten cents per ton on freight handled or lightered.

Public Messengers, twenty-five dollars per annum.

Public Scavengers, fifty dollars per annum.

Lodging Houses, ten dollars per annum.

Reindeer owned by white men, twenty-five cents per head per annum.

Fishing Vessels: Fishing vessels propelled by mechanical power of over thirty tons net and plying or fishing in the waters of Alaska, one dollar per ton per annum on net tonnage, custom house measurement, of each vessel.

Transportation: On every ton of freight shipped into or from the Territory of Alaska by any transportation company or steamship line, per annum, payable through the custom house at time of entry to be paid into the Territorial Treasury, ten cents per ton, except return shipments of casks, tanks, kegs, carboys or other receptacles used in the shipment of liquids.

Sec. 2. That the licenses provided for in this act shall be issued by the clerk of the district court or any subdivision thereof in compliance with the order of the court or judge thereof duly made and entered; and the clerk of the court shall keep a full record of all applications for license and of all recommendations for and remonstrances against the granting of licenses and the action of the court thereon: Provid-

ed, That the clerk of said court in each division thereof shall give bond or bonds in such amount as the Treasurer of the Territory may require and in such form as the governor may approve, the premium on said bond to be paid from any funds in the Treasury of the Territory of Alaska not otherwise appropriated, and all moneys received for licenses by any clerk of a district court in this Territory under this act, except the moneys derived from fisheries, (one-half of which amount shall be paid by the clerk into the Territorial Treasury to be made available for the propagation and preservation of salmon and other fish in the Territory of Alaska and to be expended under the direction of the United States Bureau of Fisheries) shall, except as otherwise provided by law, be covered into the Treasury of the Territory of Alaska, under such rules and regulations as the Territorial Treasurer may prescribe.

Sec. 3. *That any person, corporation or company doing or attempting to do business in violation of the provisions of this act, or without first having paid the license therein required, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined, for the first offense, in a sum equal to the license required for the business, trade or occupation; and for the second offense, fine equal to double amount of the license required; and for the third offense, three times the license required and imprisonment for not less than thirty days nor more than six months; Provided, That each day business*

is done or attempted to be done in violation of this act shall constitute a separate and distinct offense; Provided further, That in all prosecutions under this act the costs shall be assessed against any person, firm or corporation convicted of violations hereof, in addition to the fine or penalty imposed, and for failure to pay such fine and costs such person, firm or corporation may be imprisoned, in the discretion of the court, at the rate of one day for every two dollars of said fine and costs; Provided further, however, that in the event of any person, firm, or corporation shall fail to pay the license required by the provisions of this act and shall further fail to pay any fine that may be imposed by a court of competent jurisdiction, for such failure to so pay said license fee or tax required by the provisions of this act, judgment may be entered against such firm, person, or corporation and process shall be issued for the enforcement of the collection of said judgment and in the same manner as judgments in civil proceedings.

Sec. 4. All United States marshals and their deputies as ex-officio constables, United States fish commissioners and their deputies, in the Territory of Alaska are hereby made license inspectors under this act and shall have power and authority to go upon premises and examine the books, papers, bills of lading, and all other documents bearing upon any matters provided for in this act, of any person, firm, or corporation whom they have reasonable grounds

to believe is evading this act; and if any States Marshal, or his deputy, United States fish commissioner or his deputy, as ex-officio constables shall find any person, firm, or corporation violating this act, or any provision thereof, it shall be the duty of said deputy marshal to go before a United States commissioner, file a complaint in writing charging the person, firm or corporation so violating this act with a misdemeanor, as provided herein, and upon obtaining a warrant upon said complaint to arrest the said person, firm, or corporation and take him or them before the United States commissioner issuing the warrant, for trial.

The Territorial Legislature for Alaska, during the year 1915, passed an Act known as Chapter 76, sections four and seven, of which, respectively, read as follows:

"Section 4. Special remedies provided by this Act, or other Acts of the Legislature shall not be deemed exclusive, and any appropriate remedy either civil or criminal, or both, may be invoked by the Territory in the collection of all taxes, and in civil actions the same penalties may be collected, as are herein provided in criminal actions.

Section 7. The Act of which this Act is an amendment is hereby repealed, except in so far as the same is hereby re-enacted, but nothing herein contained shall be construed to relieve any person, firm or corporation from the payment of any tax, penalty and interest accrued and owing under the

Act of which this Act is an amendment, but all such taxes, penalties and interest shall be paid, or collected and enforced in the same manner as taxes herein provided for are collected and enforced."

The Second Session of the Legislature, which passed Chapter 76, Session Laws of Alaska, 1915, convened on the 1st day of March, 1915, at twelve o'clock noon, and on the 29th day of April, 1915, adjourned, sine die, at twelve o'clock midnight, according to the official time pieces of the Legislature. That is to say, the clocks hanging in the halls of the two houses of the Legislature were stopped or turned back by the Sargeant at Arms, just prior to the hour of twelve o'clock midnight of April 29, 1915, and thereafter between the hours of three and four o'clock A. M., sun time, of April 30, 1915, while the clocks in the halls of the Legislature still indicated an hour prior to midnight, the same having been stopped or turned back to so indicate, Chapter 76 of the Session Laws of 1915 was finally passed by both houses of the Legislature, and approved by the Governor and enrolled and filed in the office of the Secretary of State for the Territory.

The Alaska Mexican Gold Mining Company, plaintiff in error, is a corporation owning several mining claims situate on Douglas Island, in the Territory of Alaska. These mining claims contain gold mines which were operated and worked by the plaintiff in error during the years 1913 and 1914. The net income resulting from such operations between

July 31, 1913, and January 1, 1914, amounted to $57,572.43, and the net income resulting from such operations during the calendar year of 1914 amounted to $114,953.49.

The plaintiff in error during all the time that its mines were so operated by it paid a tax of three dollars per annum for each of its one hundred and twenty (120) stamps, as required by an Act of Congress in force in the Territory, but did not apply for a license under the Act of the Territorial Legislature, above set forth, either during the year 1913 or the year 1914, and did not receive a license under the provisions of said act, or otherwise, for or during either of said years to carry on the business of mining, or any other license whatsoever, and did not pay to the Territory of Alaska for a license, or otherwise, the sum of one-half of one per cent, or any other sum whatsoever, on its net income, or otherwise, under or in compliance with the provisions of the last mentioned act.

The Territory made demand on the plaintiff in error for the payment of $287.86, with legal interest thereon from January 15, 1914, claimed to be due it as taxes for the year 1914, and also made demand on the plaintiff in error for the sum of $574.76, with legal interest thereon from January 15, 1915, claimed to be due it as taxes for the year 1914.

All facts as above narrated were agreed to by the parties (see Record pages 2, 3, 4, and 5.) Upon the facts so agreed to, the cause was sumbitted to

the trial court for decision, the various contentions of the parties hereinafter discussed, having been set out at length in the agreed case. (See Record page 5 et seq.) Whereupon the Court entered judgmnt for the Territory in the sum demanded, towit, the sum of $862.61. Proper exceptions having been taken, the case was taken on Writ of Error to this Court.

ERRORS ASSIGNED AND RELIED ON FOR REVERSAL.

First Error Assigned.

That the court erred upon the submission of the cause to it on the agreed statement of facts in not concluding that the defendant was not indebted to the plaintiff in the sum demanded, or in any sum whatsoever, and entering judgment in favor of the defendant accordingly as it was requested to do by the defendant at the time the cause was submitted.

Second Error Assigned.

The Court erred in adopting as its conclusion, conclusion of law number one, contained in the judgment, "That the defendant is liable for the license tax laid by the Territory of Alaska in Chapter 52 of the Session Laws of 1913."

Third Error Assigned.

The Court erred in adopting as its conclusion, conclusion of law number two, embodied in the judgment, which reads as follows: "That the tax so due may be recovered in a civil action under the provisions of Chapter 76, Session Laws of Alaska, 1915."

Fourth Error Assigned.

The Court erred in entering judgment for the plaintiff and against the defendant.

ARGUMENT.

The four errors assigned are such that they raise practically the same questions, and can therefor be most conveniently discussed together. The first question presented is whether or not the Act of the Territorial Legislature, which forms the basis of this action, creates any civil liability. The second queston is whether this act, taken in connection with the subsequent act passed in 1915, gives any civil remedy, and the third question relates to the validity of the act of the Territorial Legislature, upon which this action is predicated. These will be discussed in their order.

I.

THE ACT OF THE TERRITORIAL LEGISLATURE CREATES NO CIVIL LIABILITY.

The act of the Territorial Legislature provides:

"Sec. 1. That any person or persons, corporation, or company prosecuting or attemputing to prosecute any of the following lines of business within the Territory of Alaska, shall first apply for and obtain license so to do from the district court or subdivision thereof in said Territory, and pay for said license for the respective lines of business and trades, as follows, to-wit:"

"Mining: One-half of one per cent. on net income over and above five thousand dollars per annum."

"Sec. 2. That the licenses provided for in this acet shall be issued by the clerk of the district court or any subdivision thereof in compliance with the order of the court or judge thereof duly made and entered; and the clerk of the court shall keep a full record of all application for license and of all recommendations for and remonstrances against the granting of licenses and the action of the court thereon." * * * * * *

"Sec. 3. That any person, corporation or company doing or attmpting to do business in violation of the provisions of this act, or without first having paid the license therein required, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined, for the first offense, in a sum equal to the license required for the business, trade or occupation; and for the second offense, fine equal to double amount of the license required; and for the third offense, three times the license required and imprisonment for not less than thirty days nor more than six months; Provided, that each day business is done or attempted to be done in violation of this act shall constitute a separate and distinct offense; Provided, further, that in all prosecutions under this act the costs shall be assessed against any person, firm or corporation convicted of violations hereof, in addition to the fine or penalty imposed, and for failure

to pay such fine and costs such person, firm or corporation may be imprisoned, in the discretion of the court, at the rate of one day for every two dollars of said fine and costs; Provided, further, however, that in the event of any person, firm, or corporation shall fail to pay the license required by the provisions of this act and shall further fail to pay any fine that may be imposed by a court of competent jurisdiction, for such failure to so pay said license fee or tax required by the provisions of this act, judgment may be entered against such firm, person, or corporation and process shall be issued for the enforcement of the collection of said judgment and in the same manner as judgments in civil proceedings."

It will be observed that under the provisions of this act it is made an offense to carry on the business of mining without first applying for and obtaining a license as in the act provided. Each day during which the business is conducted is made a separate offense. For the first offense the fine is the amount of the license. For the second offense the fine is double the amount of the license. For the third offense the fine is three times the amount of the license together with imprisonment as in the act provided. Upon a conviction the court is authorized to impose a penalty and the fine having been assessed, after conviction had, and the defendant having failed to pay the same, the court may imprison the defendant as in the act provided, and may also enter judgment against such defendant for the amount of the fine

imposed and this judgment may be collected as other judgments. Nowhere is there any provision in the act providing that the person, firm, or corporation conducting business in violation of its provisions shall become indebted to the Territory in any sum whatsoever. The act is purely penal in its nature. It provides that the doing of certain things shall constitute an offense. It provides the penalty to be imposed after conviction and the manner in which the payment of this penalty, when imposed after conviction duly had, may be enforced.

The offense created consists in doing business without first having obtained the license. And this license can not be obtained simply by paying for it, but an application must first be made to the Court or Judge. This application is filed with the Clerk, together with the recommendations for the granting of the license and remonstrances against it. The application, together with these recommendations and remonstrances, are then submitted to the Court or Judge, who then makes an order either granting or refusing the license. If the Court orders the license granted, the Clerk issues it upon the payment of the sum specified.

This act differs very widely from the ordinary act providing for privilege or occupation taxes. Under the ordinary license tax act, the license issued serves no purpose except that of a receipt for the license tax paid. But under this act, the license is a privilege that may be either granted or withheld,

depending upon the view that the Court or Judge may take of the matter after considering the recommendations for and the remonstrances against the granting of the license. The language of the act in this regard is the same as, and was evidently copied from the provisions in the Alaska Code relating to the sale of intoxicating liquors, as found in Section 2572, of the Compiled Laws of Alaska. The language found in the Act of Congress referred to is as follows: "That the liecnses provided for in this act shall be issued by the Clerk of the District Court or any subdivision thereof in compliance with an order of the court or judge thereof duly made and entered, and the Clerk of the Court shall keep a full record of all applications for licenses and of all recommendations for and remonstrances against the granting of licenses and of the action of the court thereon."

It will be observed that Section 2 of the Act of the Territorial Legislature is a verbatim copy of the section just quoted. The only distinction between the Act of Congress and the act of the Territorial Legislature being that the act of Congress by subsequent provision provides under what circumstances the court or judge shall, and under what circumstances he shall not grant the license. This provision is omitted from the Alaska Act, so that under it the action of the Court or Judge in granting or refusing a license is purely arbitrary, and is based upon nothing except the remonstrances

and recommendations filed with the application and submitted to him therewith. This matter will be fully discussed when the effect of this provision upon the validity of the act is considered.

Attention is called to it at the present time to point out that the offense for which the penalty is provided does not consist in a failure to pay the license fee prescribed, and that the liability following the commission of the offense could not be avoided by paying it. Suppose the tax had been paid as required, and the application presented to the court with such recommendations as the applicant might be able to obtain, the remonstrances filed in opposition to the granting of the license might out-weigh the recommendations, and the court might for this or for some other reason, deny the applicant's application and refuse to make an order allowing the granting of the license. The payment of the money would in that case not serve as any protection. The applicant would still be guilty of the offense prescribed, if he persisted in conducting his business after the court had denied him a license. The case falls squarely within the reasoning employed by this court in the case of United States vs. Jorden, 193 Fed. 986. In that case, a civil proceedings was instituted to recover the wholesale fee of a retailer of intoxicating liquors, who was selling at wholesale in violation of the law. The proceeding was instituted under the Act of Congress in force in Alaska, relating to licenses for the sale of intoxicating liquors, which

as has already been pointed out, is in respect to the matters above referred to identical in terms with the act of the Territorial Legislature now before the Court, the latter being evidently copied from the former. The exact question decided in that case was that a civil action could not be brought to recover the license fee in a case where the defendant had violated the law. But the court in passing upon that matter clearly pointed out the reason why a civil liability did not exist in cases of that character. The court say:

"The case at bar is unlike that of United States vs. Chamberlain, 219, U. S. 250, 31 Sup. Ct. 155, 55 L. Ed. 204, in which it was held that an action would lie by the United States to recover the amount of a stamp tax payable under the war revenue act of June 13, 1898, upon the execution of a conveyance. The present action is not one to recover a tax imposed upon the performance of an act which all persons are permitted to perform, and which in itself is not in any way regulated or restricted, but it is an attempt to recover a fee which the law prescribed as one of the conditions upon which might be obtained the permission to engage in a specified business which is declared by law to be unlawful without that license. The fee is not a tax imposed upon the business of selling liquor. The statutes of Alaska do not extend to all persons who are willing to pay the license fee permission to engage in the business of selling liquor. The privilege is hedged about

with restrictions and conditions, one of which is that the majority of the residents of the vicinage shall consent to the issuance of the license. Nor do the statutes confer upon the district attorney the power to legalize an illegal traffic, and to declare that, after the law has been broken, the lawbreaker shall pay the government the license for doing that for which no license has been given. The defendant in error is not indebted to the government. He has not complied with the terms upon which he could acquire the right to conduct a wholesale liquor business. He has conducted an illegal business, and has done acts prohibited by law—and for those acts the statutes prescribe but one remedy — the criminal prosecution and punishment of the offender. Of such an offender it was said in State v. Adler, supra:

> ' "He is a violator of the law, and as such is liable to fine and imprisonment for his offense. But the offense is not that he has failed to pay a sum as taxes on the business transacted, or even that he has conducted the business without payment of the license tax. Payment of the sums fixed as the price of the license would not of itself have legalized the business. Compliance with all the other numerous provisions of the statute would be required to render it legal." '

So also in the case of State v. Adler, 9 So. Rep. 674, referred to by this court in the opinion above referred to, the distinction between a license tax due

under a law where the license issues as a matter of course upon the payment of the money and an amount required in connection with the issuance of a license which does not issue as a matter of course, is clearly pointed out. In the last mentioned case, the court say:

"The argument for appellant is that one who has failed to return his property for assessment owes the state, as a delinquent tax-payer, the tax which would have been assessed against it if returned, and, followed to its logical conclusion, would embrace the right of the revenue agent to sue for a fine which one guilty of assault and battery ought under the law be required to pay upon conviction of the offense; for taxes upon unassessed property are no more due and delinquent than is the unimposed fine of the actually guilty but unconvicted violator of the criminal law."

II.

THE LAWS OF ALASKA DO NOT PROVIDE FOR A CIVIL REMEDY FOR THE COLLECTION OF THE AMOUNT SUED FOR.

The act of the First Territorial Legislature nowhere provides for its enforcement in a civil proceeding. In that respect, it is altogether similar to the Congressional Acts before this court in the case United States v. Jorden, 193, Fed. 986, and the case of the United States v. Northwestern Development

Company, 203 Fed. 961, also decided by this court. The decision in the latter case relates to the right of the government to collect by a civil proceeding a license tax due under the Congressional Act in force in the Territory, exacting license taxes from those engaged in business and trade. This Act, like the present Act, provided for no civil remedy, and the court held that the criminal remedy especially provided was exclusive.

It is urged, however, that the Territory is given a civil remedy because of the provisions in the Act of 1915, above referred to. That Act in terms repeals the act of 1913, but contains the proviso that nothing therein contained shall be construed to relieve any person, firm or corporation from the payment of any tax, penalty and interest accrued and owing under the former act, but it is provided that such tax, penalty and interest shall be paid or collected and enforced in the same manner as taxes under the Act of 1915 are collected and enforced. And a previous section provides that taxes under the latter act may be enforced by resort to any appropriate remedy, either civil or criminal.

The difficulty, however, is that, as has already been pointed out, no tax, penalty or interest is or can be owing under the provisions of the Act of 1913, until after a conviction has been had, and since no conviction has been had there is nothing owing for which the present action can be maintained. Nor can the Act of 1915 supplement the Act of

1913 in this regard, for if the former act be so construed as to create an obligation not existing under the latter, it would be retroactive in its provisions, and for that reason void.

And while it may be conceded that the inhibition against retroactive legislation does not apply to laws that relate purely to the remedy, it does not follow that a law providing that a civil suit may take the place of a criminal prosecution in the assessment and collection of fines due under a penal law would be valid. Such an act does not relate purely to the remedy, but creates a civil liability where none existed before. To use the illustration employed by the Supreme Court of Mississippi in the case above referred to: If such an act were held valid it would be equivalent to saying that a law could be passed providing for the collection of a fine imposed by law on one committing the crime of assault and battery.

In addition to creating a civil liability where none existed before, such an act would deprive one charged with crime of all the safeguards provided by our Constitution and laws in connection with the enforcement of criminal statutes. If a civil remedy could be substituted for one in accordance with criminal procedure, a person violating a criminal statute could be compelled to be a witness against himself and be convicted and compelled to pay the penalty imposed without enjoying the right of a speedy and public trial before an impartial jury, as provided by the Constitution, without being informed of the na-

ture and cause of the accusation, without being confronted with the witnesses against him, and without having compulsory process for obtaining witnesses in his favor, and without having the assistance of counsel. An act of this character therefore can hardly be said to belong to that class which do not come within the inhibition against retroactive and ex post facto laws.

Even if the provisions contained in the Act of 1915 had originally been enacted as a part of the Act of 1913, a civil proceeding could not be brought to collect a fine. To do so would be to deprive the accused of the constitutional rights above referred to; and the provisions so inserted in the act authorizing any such proceeding would be void, because obnoxious to Articles V and VI of the Constitution.

III.

THE VALIDITY OF THE ACT PASSED BY THE TERRITORIAL LEGISLATURE WHICH FORMS THE BASIS OF THIS PROCEEDING.

The Act of the Territorial Legisalture is invalid for three reasons: First, it requires the doing of that which is impossible, and is so indefinite and uncertain in its provsions that it can not be enforced. Second, it violates the provisions of the Federal Constitution. Third, it violates the provisions of the Organic Act. These will be discussed in their order.

A. It Requires the Doing of that which is impossible and is so uncertain and indefinite in its provisions that it cannot be enforced.

The Act provides, that any one engaging in the business of mining, without first obtaining and paying for a license so to do a sum equal to one-half of one per cent on his net income, over and above five thousand dollars, shall be guilty of a misdemeanor; that each day he carries on such business or attempts to do so without paying for and obtaining a license, he commits a separate and distinct offense; that for the first offense he shall be fined upon conviction a sum equal to the amount of the license. For the second offense, he shall be fined double the amount of the license, and for the third offense he shall be fined three times the amount of the license, and in addition thereto shall be imprisoned for not less than thirty days, nor more than six months.

Section 3 provides in express terms that the amount of the license tax must be paid in advance. It will be observed that the amount that must be so paid for the license is one-half of one per cent on the net income, over and above five thousand dollars per annum. Under this provision, therefore, one engaged in the business of mining is required to predict in advance the amount of his net income for the coming year, and pay to the Territory one-half of one per cent on the amount of such net income in excess of five thousand dollars. That this cannot be done is obvious.

Under this provision, one engaged in mining in Alaska can never tell whether his conduct is or is not going to subject him to criminal prosecution until he has persisted in it for a period of a whole year. He is indeed fortunate if he finds at the close of a year's operations that he has operated at a loss, or that his income does not exceed five thousand dollars, for in that case he can at least not be subjected to fine and imprisonment. If his fondest hopes have been realized and he finds at the close of a year's business that he has made a profit in excess of five thousand dollars, he has committed three hundred and sixty-five (365) offenses during the course of the year, with one additional, if the year happens to be Leap Year. For the first of these offenses, he is subject to a fine equal to one-half of one per cent of his net income, in excess of five thousand dollars. For the second of these, he is subject to a fine in double this amount. For the third of these, he is subject to a fine in three times this amount, and in addition to this, is required to be imprisoned not less than thirty days, nor more than six months. If the court did its full duty in imposing all the cumulative sentences provided for under this Act, the fines would many times exceed his income, and no ordinary man could ever hope to live long enough to serve his sentence out.

Some difficulties also would be encountered in attempting to enforce this law. If a lawless person engaged in mining without first obtaining and pay-

ing for a license should be indicted and brought to trial, the prosecution of course would be called upon to prove what his net income for the year was going to be. For without this proof, it would be impossible to tell whether the alleged offender had in fact committed a crime. The Delphian Oracle could not be consulted, for the stupefied priestess would be aroused from her stupor long before she could be transported to far away Alaska, and it is only those utterances that come from her lips immediately upon being aroused that can be relied upon. And this journey could not be avoided, as the defendant in a criminal prosecution has a right to be confronted with the witnesses against him. Nor would the situation be measurably relieved if the culprit should plead guilty, for then the court would be required to impose sentence, and the penalty to be imposed is in each case made to depend upon the amount of the license, which in turn must be calculated upon an income, the amount of which is unknown.

It requires neither argument nor citation of authorities to show that this law can neither be complied with nor enforced.

There is, however, still another reason why this law could not be complied with by the plaintiff in error. The Act provides that the amount of the license tax shall be paid to the Clerk of the court. No other person is authorized by the Act to receive it, and under a decision by this court the Clerk of the court was not authorized under the Organic Act to act for

the Territory in this regard, he being an officer of the Federal Government.

Callahan vs. Marshal, 210 *Fed.* 231.

In addition to this, it was stipulated that the Clerk never qualified to act under the Territorial Law. (See Rec. Page 4.)

B. It violates the provisions of the Federal Constitution.

The Act of the Territorial Legislature violates the provisions of the Fourteenth Amendment of the Constitution of the United States in two respects: First, it confers upon the court or judge the power to deprive the plaintiff in error of its property arbitrarily and capriously; and Second, it exacts from the plaintiff in error a tax which is not exacted from others similarly situated.

B 1. It confers upon the court or judge the power to deprive the plaintiff in error of its property arbitrarily and capriciously.

The Act of the Territorial Legislature provides as follows: "That the licenses provided for in this Act shall be issued by the Clerk of the District Court or any subdivision thereof in compliance with the order of the Court or Judge thereof duly made and entered, and the Clerk of the Court shall keep a full record of all applications for licenses and of all recommendations for and remonstrances against the granting of licenses, and the action of the court thereon." No conditions whatsoever were prescribed in the Act, a compliance with which would entitle

an applicant to a license, but the whole matter was left to the arbitrary will of the court or judge.

The court or judge, under this provision, passes upon an application for a license, and either grants or refuses it, as the case may be, with nothing before him except the recommendations for and the remonstrances against the granting of the license filed with the application. These recommendations may be used upon any ground whatsoever, and this is also true of the remonstrances. Yet it is upon these, together with the application, that the court is required to base its action.

Under this law, the court or judge is endowed with absolute power from which no appeal lies to grant or refuse a license to one following an occupation useful and necessary to society, and to deny an owner of property the right to use his property in all cases where a license is required in connection with such use. Since in acting upon an application the court or judge has nothing before him except the application and the recommendations and remonstrances based upon such grounds as may seem proper to the recommenders and remonstrators, he has nothing to guide him except his caprice and nothing to control him except his arbitrary will.

Nor is this arbitrary power to be exerted in connection with the regulation of those occupations which are liable to endanger the public health or public morals or the good order of society, so that their exercise might in proper cases require police

regulation. But the court or judge may, under this act, deny to anyone the right to carry on those useful and necessary occupations upon which the well being of society depends. Included among the industries that cannot be carried on without the permission of the court or judge, granted in the form of a license, are mining and fishing. Not only do the mines and the fisheries lie at the foundation of all industrial prosperity in Alaska, but their products add to the comfort and well being of the whole race. The former fill the arteries of trade with gold, the latter supply a cheap food product that can nowhere be excelled. Yet under this remarkable act, the court or judge is empowered to shut down every mine and every fishery without offering any reason or excuse for so doing.

In the case of those occupations which are considered harmful in themselves, unless controlled and regulated under the police power, it is often essential that the person pursuing such occupations be of good moral character, or that some other suitable condition be complied with, and the question of whether the applicant has a good moral character, or has complied with the requisite conditions, must of course be passed upon by the court, judge or other board or tribunal issing the license, but even in those cases arbitrary power to grant or refuse a license can not be lodged in any tribunal. A tribunal may be empowered to determine the question of whether or not the conditions prescribed have been complied

with, but it can not be empowered, even in those cases, to grant a license to one and to refuse it to another just because caprice or other similar consideration may dictate that this should be done. This might have been well enough during those primitive times when those subject to established governments were governed by men. But such power can not exist where government by law prevails, and this would be so independent of the constitutional guarantees upon the subject.

In Alaska some concerns engaged in mining and fishing have invested many millions of dollars, yet under this law they are required to make an application to the court or judge for permission to carry on the enterprises in connection with which these investments are made. Nothing in the world that these concerns can do will place them where they can demand a license as a matter of right. Their friends can recommend and their enemies can remonstrate; if the court or judge grants the license it comes as a gracious favor; if it is refused the applicant has not even the right of appeal.

It is stipulated in this case that the plaintiff in error is the owner of a number of mining claims containing valuable mines. The right of property of course carries with it the right to its free use and enjoyment, a denial of the right to use property is clearly an invasion of the right of property itself. This law, therefore, not only confers upon the court or judge arbitrary power to deny to those engag-

ed in mining the right of following a useful and commendable occupation, and in that manner invades the right of property, for these occupations are property within the meaning of the provisions of the constitution, but it deprives the plaintiff in error of property for the further reason that it is denied the right to operate its mines without the permission of the court or judge.

This law violates all the provisions contained in the first section of the Fourteenth Amendment. It abridges the privileges and immunities of citizens of the United States. It deprives persons of property without due process and denies to those within the jurisdiction of the Territory the equal protection of the laws.

A case in all respects like the one at bar was before the Supreme Court of the United States, where it was held that such legislation could not be sustained. Yick Wo v. Hopkins, 118 U. S. 356. An ordinance had been passed by the City of San Francisco, providing that it should be unlawful for any one to conduct a laundry in a wooden building, without a permit obtained from the Board of Supervisors. The ordinance contained no regulatory provisions, but it was contended that it might be sustained as a valid exercise of the police power, because it referred to wooden buildings, which were more liable to take fire if used for laundry purposes than buildings of brick or stone. And the Supreme Court of California took this view of it. The Su-

preme Court of the United States, however, held that the ordinance could not be sustained, either as an exercise of the police power, or otherwise. In speaking of the ordinance, the court say:

"The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions, for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows, without restriction, the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this: that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is

submitted to the judgment of the officer, and calls for the exercis of a discretion of a judicial nature."

And again in the course of the opinion, it is said: "For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

This case being on all fours with the case at bar it is not necessary to cite further authorities upon this subject.

B-2. IT EXTRACTS FROM PLAINTIFF IN ERROR A TAX NOT EXACTED FROM OTHERS SIMILARLY SITUATED

It will be observed that under the provisions of this law, those engaged in mining are required to pay one-half of one per cent. on their net incomes, provided their net incomes exceed five thousand dollars per annum. This is clearly an income tax. And none except those engaged in mining are required to pay it. Incomes derived from other sources are not taxed. It would be difficult indeed to imagine a reason why a person whose income is derived from mining should be required to pay a tax on such income when all incomes derived from other sources are exempt from taxation. Mining is a useful, lawful and commendable occupation and the income derived therefrom does not differ in character from

the income derived from any other business. This act therefor discriminates against those engaged in mining in favor of those engaged in other pursuits, and denies to the former the equal protection of the laws. Not only this, but it discriminates against those engaged in mining who have an income in excess of five thousand dollars in favor of those similarly engaged, whose income is less than five thousand dollars. The benefit of this exemption extends to persons, firms and corporations alike.

This whole matter was before this court in the case of Peacock vs. Pratt, 121 Fed. 272. In that case. the court was called upon to pass upon the validity of an income tax imposed by the Legislature of Hawaii Territory. Under that act, the incomes of certain enumerated religious and charitable institutions were exempt from taxation. The incomes of certain insurance companies were also exempted, but in the case of the insurance companies the act expressly stated the reason for the exemption, that reason being that these insurance companies were subjected to another special tax. Incomes of natural persons to the extent of $1,000.00 were also exempted. This exemption did not extend to corporations. It was contended that these exemptions resulted in illegal discrimination.

The Organic Act of the Hawaii Territory differs from the Alaska Organic Act in that it imposes no restrictions upon the exercise of the taxing power. The limitations imposed by the Alaska Organic Act

upon the exercise of this power will be more clearly pointed out when the validity of the act before the court is discussed in the light of the Organic Act. For the present, the discussion will be confined to its validity in the light of the Federal Constitution. Since the Organic Act of Hawaii contains no limitations upon the taxing power, the sole question presented before the court was whether the alleged discriminations were such as would render the act void under the provisions of the Fourteenth Amendment. It will be noted that the income tax law then before the court provided for the taxing of all incomes alike, however derived, except in case of the enumerated charitable institutions, and in the single case of the insurance companies.

This court very properly held that a sound public policy required an exemption of the charitable institutions, and that the exemption of the insurance company did not result in any illegal discrimination for the reason that an equivalent tax was imposed upon the insurance companies by another act. A statement containing this reason for exempting the insurance companies being contained in the income tax act itself.

After so deciding, this court layed down the rule governing the questions as to whether a given tax law violates the provisions of the Fourteenth Amendment. The court say: "The rule is that unequal taxes may not be imposed upon property of the

same kind in the same situation and used for the same purpose."

The law passed by the Alaska Legislature singles out for taxation the incomes derived from mines and imposes a tax on no incomes except these. No reason is assigned for so doing. Nor, as has already been pointed out, can any exist. The Alaska law differs from the Hawaii law in that the latter bears upon its face the evidence of fairness and lack ofdiscrimination, while the former is characterized by an utter want of these characteristics. Clearly, under the rule laid down by the court, the singling out of the incomes derived from mines for taxation is an unjust discrimination against those whose incomes are derived from that source.

The five thousand dollar exemption contained in the Alaska Act also differs very widely in character from the thousand dollar exemption contained in the Hawaii law. Under the provisions of the latter law, natural persons only were entitled to this exemption. Such exemptions, as the court well stated, are up-held "on grounds of enlightened pubilc policy—a public policy which seeks to exclude from taxation the living expense of the average family, and thus enable the poor man to escape becoming a public burden." Under the Alaska Act, the exemption is not only five times as large, but extends to persons, firms and corporations alike. Public policy can not require this exemption in the case of firms

and corporatins, for neither of these require living expenses, nor can either become a public burden.

Again, the exemption of five thousand dollars would seem unreasonably large in any case. While it must be conceded that the amount of the exemption must to a large extent be left to the discretion of the Legislature, the power and authority of the Legislature in this regard is not unlimited but must be exercised within the bounds of reason. It would seem that a five thousand dollar exemption is more than is necessary to secure to the average family the means of living. To hold that this is an unreasonable discrimination would be in exact accord with the views expressed by this court in the case of Peacock vs. Pratt.

C. IT VIOLATES THE PROVISIONS OF THE ORGANIC ACT.

The act on its face is a revenue act designed to raise revenue, requiring the payment of a fixed sum in each of the enumerated cases for a license. It is entitled, "An Act to establish a system of taxation, create revenue and provide for collection thereof for the Territory of Alaska and for other purposes." Section One provides, "That any person, or persons, corporation or company, prosecuting or attempting to prosecute any of the following lines of business within the Territory of Alaska shall first apply for and obtain license so to do from the District Court or subdivision thereof in said Territory, and pay for

said license for the respective lines of business and trade, as follows, to-wit: * * * * * * * Mining: one-half of one per cent. on net income over and above five thousand dollars per annum."

In order to consider the validity of the act in so far as it relates to the matters in dispute it is necessary to ascertain the meaning of the language employed, in so far as it relates to such matters. That the sole object of the act is the collection of revenue is not disputed. It is conceded that the amount sued for is sought to be recovered as taxes due under the provisions of the act. It remains to be seen, however, whether the tax sought to be collected is an income tax on the incomes derived from mines or an occupation or business tax generally referred to as a license tax. It is obvious that the tax belongs to one or the other of the two classes named. Its validity will therefor be considered from both view points.

(C-1.) VIEWED AS AN INCOME TAX.

Whatever power is possessed by the Territorial Legislature of Alaska is derived from the Organic Act. Congress has under the constitution plenniary power to legislate for the territories. It may either exercise this power or it may delegate it in whole or in part to a territorial legislature. In the case of Alaska is has in part only delegated its powers in this regard to the Legislature of the Territory by the Organic Act.

The Organic Act of a territory is a grant of legislative powers. In that respect it does not differ from the charter of a municipal corporation or the constitution of the United States. Such grants are always strictly construed. No power passes except such powers as are either expressly conferred or are conferred by necessary implication. The powers expressly conferred are those that are stated in express terms. The powers conferred by necessary implication are limited to such as may be necessary to carry into effect the powers expressly granted.

Every sovereign power has the inherent right to collect revenues since this right is necessary to its existence. The Territory of Alaska, however, is not a sovereign power so as to be endowed with this inherent right. It is a mere territory of the United States and its legislature is the creature of the Congress; like other legislative bodies similarly created it is endowed with such powers only as are conferred upon it.

The Organic Act contains a provision similar to the general welfare clauses ordinarily contained in the charters of municipal corporations. This provision reads as follows:

> "The Legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States."

Under it the power to raise revenues by means of taxation is in a general way, subject to the limita-

tion elsewhere imposed, conferred; but since legislative grants are strictly construed, the powers thus conferred in a general way must be exercised in strict conformity with the specific requirements of the Organic Act itself and in strict subordination to the limitations imposed.

The organic act contains the following provision: "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof. The tax in question viewed as a tax on the income of mines violates two of these provisions.

In the first place it is not uniform upon the same class of subjects. If the subject of taxation is incomes it will not do to confine the taxation of incomes to those derived from mines, for these do not differ from incomes derived from other sources. Incomes are incomes however derived and if incomes are the subject of taxation, all incomes must of necessity be considered as belonging to the same class. No tax therefor can be uniform upon the same class of subjects if levied on incomes unless all incomes are included regardless of whether they are derived from mining or from some other source.

This act, however, goes further and provides that only such incomes derived from mining as exceed five thousand dollars per annum shall be taxed. This exemption is not to be considered as an exemption dictated by considerations or public policy with

a view of exempting the living expenses of persons engaged in mining, but as an arbitrary discrimination since it applies to persons, firms and corporations alike. Neither reason nor authority would permit the legislature to exempt any part of the incomes of either firms or corporations. This amounts then to a further discrimination against those engaged in mining whose incomes exceed five thousand dollars.

This law viewed as an income tax also violates the provision requiring assessment according to value. No provision is made in the act for any assessment whatsoever. Whereas the Organic Act clearly requires first that an actual assessment be made and second that the assessment so made shall be according to value. The question of whether an actual assessment was required by a provision of ~~the~~ this character ~~charter~~ was before the Supreme Court of Kentucky in the case of Levi v. City of Louisville, 30 S. W. 973. The City of Louisville had adopted an ordinance providing that real estate should be taxed at a fixed per cent as well as personalty not used in connection with trades or business on which a license was paid, but the personalty used in connection with such trades and business should not be subject to a further tax.

The question presented for determination related to the right of the city to substitute as to personalty the license tax for a tax under the ad valorem system, and thus tax personalty without making any

assessment. The constitution of Kentucky contains the following provision, "All property not exempt from taxation by this constitution shall be assessed for taxes at its fair cash value." It also contains a provision providing that nothing in the constitution shall be so construed as to prevent the imposition of license taxes. It was argued that under these constitutional provisions a license tax might be imposed on the personal estate of those engaged in mercantile and business pursuits, and that uniformity and equality in taxation might be reached by a diversity of means as applied to the various kinds of property. But the court held that such a tax could not be sustained; that under the constitutional provision personal property could not be taxed except upon its cash value ascertained by an assessment of the property. The court say: "The power to prescribe the mode of assessment for ascertaining the value of property has been taken from the legislative control and fixed by the constitution so there is nothing left but to follow its provisions and no authority is given the legislature to value or have property valued but in one mode." Further on in the course of the opinion it is said: "Nor do we find in the constitution a provision of any kind conferring on the municipal government the power to assess property for the purpose of revenue by imposing a license tax. Nor has the legislature the power to authorize the imposition of a tax on the amount of

property whether real or personal in any other mode than that prescribed by the Organic Law."

The provision in the Alaska Organic Act, like that of the constitution of Kentucky requires that there shall be an assessment according to value. No other mode is indicated by which the value can be ascertained except upon an assessment. The case therefore falls squarely within the rule as laid down by the Supreme Court of Kentucky.

Again, even though the act were considered as if an assessment of the income itself had been made without any reference to the property from which such income was derived, so that the income were taxed irrespective of the relation it bore to such property, it would have to be according to actual value. Under the act of the Legislature the first five thousand dollars of actual value is left out of consideration so that the tax is not imposed upon the actual value of the income, but upon the value of the income less five thousand dollars.

An actual assessment of the income resulting from mining and an ad valorem tax based upon an assessment, however would not meet the requirement of the Organic Act that taxation must be according to actual value.

A tax upon incomes is a tax upon the property from which the income is derived. It was so held by the Supreme Court in the case of Pollock v. Farmers' Loan and Trust Company, 157 U. S. 429. Under the doctrine laid down by the Supreme Court in that

case, the tax laid upon the income resulting from mining by the Territorial Legislature is a tax upon the mines themselves, and not being assessed according to the actual value of the mines, the tax fails to comply with the provision that taxation must be according to actual value.

In the case of State v. Cook, 36 Atl. 892, the Supreme Court of New Jersey had occasion to pass upon the validity of a tax on mines assessed according to their income. The constitution of New Jersey provides that "all property shall be assessed for taxes at its true value." Under this constitutional provision the Supreme Court held that if mines were taxed their actual value must form the basis for taxation, regardless of the income. The court say: "That income is a criterion for valuation for taxation is peculiarly inappropriate to the taxation of mining property, in relation to which each year's income represents to that extent a diminution in the actual intrinsic value of the property."

Nor does the fact that the tax in question is referred to by the Territorial Legislature as a "license tax" in any way alter the situation. The fact that an income tax is called a license tax does not make it such. It has been often held that the character of a tax is not affected or changed by the name given to it. In the case of Brown vs. Maryland, 12 Wheat-419, it was held that a tax on the occupation of an importer was the same as a tax on imports and therefor void. In that case Chief Justice Marshall said:

"It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself."

It was upon the language thus expressed by Chief Justice Marshall that the decision in the case of Pollock v. Farmers' Loan and Trust Company, with relation to the matters above referred to, was largely based.

The decision of the Supreme Court in the case of Brown v. Maryland was followed by that court in the case of Welton vs. State, 91 U. S. 278. The state of Missouri passed a law exacting a license tax from peddlers selling merchandise manufactured outside of the state. This act was held to be an interference with interstate commerce and void. It was urged that the license tax was required from the peddler and was not a duty imposed upon the goods he sold; that the goods were the subject of interstate commerce and not the peddler, that for this reason the license tax did not interfere with interstate commerce, but the court held that a license tax exacted for the sale of goods was in effect a tax upon the goods themselves. In passing upon this question, Mr. Justice Fields, speaking for the Court, says:

"The license charge exacted is sought to be maintained as a tax upon a calling. It was held to

be such a tax by the Supreme Court of the State; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the state.

The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license."

The state courts also have frequently held that the character of a tax is not determined by the name given it. Thus in the case of Standard Oil Company v. Commonwealth, 82 S. W. 1020, the Supreme Court of Kentucky had before it an act of the Legislature imposing a license tax of $10 on all oil deposits. The constitution of Kentucky contained a provision requiring all property taxes to be assessed according to value, but allowing the imposition of license taxes. The question therefor arose whether this was a license tax or a property tax. If a property tax the constitution required it to be according to value. If a

license tax it might stand since the constitution expressly provided that license taxes might be assessed, without regard to this constitutional requirement. The court, however, held that notwithstanding the fact that the tax was called a license tax by the legislature it was a property tax and as such was void because not assessed according to value.

So also in the case of Pittsburg, Cincinnati and St. Louis Railroad Co. v. The State, 30 N. E. 435, the question arose whether a law exacting a fee of $1.00 per mile from railroads operating in the state of Ohio, exacted a fee under the police power or laid a tax on property. Under the provisions of the constitution of Ohio the legislature had the usual power to exact fees in the exercise of the police power for the purpose of paying the cost of regulation. But the court held that the exaction was a tax on the railroads of the state, notwithstanding the fact hat it was called a fee, and that it was void because it lacked uniformity and was not assessed according to value, as required by the Ohio constitution. In the course of the opinion, the Supreme Court of Ohio, say:

"What is this statute? Its constitutionality must be determined by its operation. It provides in terms that there be placed upon each mile of railroad track within this state an exaction of $1 per annum; the statute calls it a "fee", but its nature is not affected by the name that may be assigned to it."

So also in the case of Pittsburg Railroad Co. v.

Pittsburg, 60 Atl. 1080, it was held by the Supreme Court of Pennsylvania that a license tax upon street railways of twenty-five cents per foot for each lineal foot of track was not a license tax notwithstanding the fact that it was so called, but was in fact a tax upon the tracks of the street railway companies.

The same doctrine was laid down by the Supreme Court of Missouri in the case of Brookfield v. Toory, 43 S. W. 387. The city of Brookfield in that state had passed an ordinance requiring merchants to pay a license tax, the amount of the tax required in each case being one per cent upon the cash value of the stock of goods, wares and merchandise kept on hand for sale. The court held that this was not a license tax, but a tax upon the merchants' stock. In the course of the opinion it is said: "In a word can this tax of one per cent upon the cash value of the goods on hand be held as an occupation or privilege tax. After a careful investigation of the question mooted and most ably discussed by counsel, it seems palpable that this is a property tax pure and simple. It is an obvious mis-nomer to call it a tax upon occupation."

In the case of Banger's Appeal, 109 Pa. St. 79, elsewhere referred to in this brief, the city of Williamsport sought to collect an occupation tax, the amount of which was in each case determined by the income of the person taxed. This tax was held to be void on two grounds. One of these was that it was in fact an income tax, which the city had no pow-

er to collect. The other was that if viewed as a license tax it lacked uniformity. With reference to the first ground upon which the tax was held void, the Supreme Court of Pennsylvania say: "This brings us at once to a vice underlying the whole case. Under the guise of an occupation tax, the city of Williamsport has levied and is seeking to collect an income tax."

(C.-2) Viewed as a License Tax.

The power of the legislature to levy or collect taxes, does not exist as an inherent power but because of a grant contained in the Organic Act and must, as was said when the validity of income taxes was being discussed, be exercised in strict subordination to the provisions in the Organic Act expressly limiting that power.

The act requires that "ALL TAXES SHALL BE UNIFORM UPON THE SAME CLASS OF SUBJECTS AND SHALL BE LEVIED AND COLLECTED UNDER GENERAL LAWS AND THE ASSESSMENTS SHALL BE ACCORDING TO THE ACTUAL VALUE THEREOF." This provision requires all taxes to be uniform upon the same class of subjects, requires all taxes to be levied and collected under general laws and requires all taxes to be assessed according to the value of the thing which is the subject of taxation—under it there must be uniformity, there must be an assessment and the tax must be based upon value. Again, the provision applies to all taxes meaning each and

every tax; its effect is nowhere limited to property taxes, nor does it contain an exception in favor of licenses taxes.

The tax in question violates each of these requirements. In the first place it can not in any sense, as has already been pointed out, be regarded as uniform upon the same class of subjects. The lack of uniformity in this tax is amply illustrated by the case that arose in Pennsylvania, Banger's Appeal, 109, Pa. St. 79. The city of Williamsport sought to collect an occupation tax, the amount of which was in each case determined by the income of the person taxed. The tax was held void on two grounds. First it was held that the tax was in fact an income tax, which the city had no authority to levy or collect. And second, that if viewed as a license tax it would nevertheless be void because it was not uniform upon the same class of subjects as required by the Pennsylvania constitution.

In passing upon this question of lack of uniformity in the tax, the court say, having previously referred to some of the views expressed by the trial court, "These views of the learned court are well enough as far as they go, but they do not come to the proper standard of uniformity. However, they might have been regarded prior to the adoption of the present constitution. They do not conform to the requirements of the Organic Law as it exists at the present time. That requires not merely that there shall be no exemption of persons or classes,

but that upon persons and classes the tax shall be uniform. Thus in levying a tax upon "occupation" a tax of $100 upon every person having a known occupation would be uniform, but what uniformity is there in laying an occupation tax of $100 upon A and a like levy of $200 upon B, the occupation of each being similar?"

And again in the course of the opinion it is said: "It may be asked how an occupation is to be assessed and how is the constitutional mandate to be complied with? The answer is not difficult. A tax of $100 upon all occupations would be uniform. We are at once confronted with the objection that it would be unjust to tax the occupation of a laborer the same amount as a merchant, a physician or a lawyer. The injustice of such an exercise of the taxing power may be conceded without in any degree impairing the force of the argument. The objection is one that appeals more to the Legislative than to the judicial department of the government. The proper result may possible be reached by classification. Thus it may be that physicians, lawyers, clergymen, merchants, bankers, manufacturers, mechanics, etc., etc., may be classified and a uniform occupation tax assessed upon each class, but it will not do to tax one member of a class $100 and another member of the same class $1000 upon a supposition or even upon the fact that one earns more than the other. An occupation tax is peculiar in its character. It is not a tax upon property, but up-

on the pursuit which a man follows in order to acquire property and support his family. It is a tax upon income in the sense only that every other tax is a tax upon income. That is to say, it reduces a man's clear income by the precise amount of the tax, but it is an income tax in no sense."

Nor does the law comply with the provision that there must be an assessment for no assessment of any kind is provided for. The principal objection, however, to the tax when viewed as a license tax is that it is not assessed according to the value of the thing taxed. Viewed as a license tax on the occupation of mining it utterly fails to comply with the requirement that the tax must be assessed according to the actual value of the thing taxed, for in that case the occupation is the thing which forms the subject of taxation. No attempt is made to place a value upon this. The amount of the tax is made to depend upon the income derived as a result of carrying on the business or occupation taxed, but the value of the income is not the value of the business or occupation. At most it represents the net profit realized during a given year, but this profit or income can in no sense be said to be the equivalent of the business or occupation from which it results. It might be resorted to as a criterion in determining the value of such occupation or business, but it is not and in no case can be an assessment of the value of the business or occupation that forms the subject of taxation. Hence if the tax is regarded as a license

tax it wholly fails to comply with the provision that it must be assessed according to value.

The learned trial judge, however, in the case of the Territory of Alaska, v. Alaska Pacific Fisheries expressed the opinion that a tax in many respects similar to this tax was a license tax, and that taxes of this character could be levied without complying with the requirements of the provision referred to, notwithstanding the fact that by its express term, "all taxes" without exception are made subject to the requirements mentioned. This view is based upon an erroneous conception of the effect of some of the decisions of the state courts.

These decisions were rendered in states having a variety of constitutional limitations and restrictions upon the taxing power, all unlike the provision contained in the organic law of Alaska. Of course the effect of a limitation contained in the organic law of any state or territory must depend in each case upon the language of the provision containing the limitation; and the decisions of the courts relating thereto must be read in the light of the language of the provision construed.

By many of the state constitutions license taxes are expressly provided for or excepted from the operation of the requirements of uniformity and assessment according to value. By others the provisions containing these requirements are expressly limited in their application to property taxes. By the Organic Law of Alaska all taxes, without ex-

ception, must comply with the requirements of uniformity and assessment according to value. An examination of the decisions upon which the opinion of the learned trial Judge is based will disclose the fact that they can all be distinguished for one or the other of the reasons given except only those cases which relate to licenses exacted for the purpose of regulation under the police power as distinguished from license taxes exacted for the purpose of revenue under the taxing power. These cases of course rest upon an entirely different principle.

When in the interest of the public health, the public morals or the public safety it becomes necessary to supervise or regulate an occupation or business, the legislature may require a license from those engaged therein for the purpose of regulating the same, and may in that connection adopt such regulatory provisions as may be necessary, it may also require the payment of a license fee sufficiently large to pay the costs of issuing the license and in addition thereto the costs of supervision and regulation. The fees required to be paid, however, cannot exceed the amount necessary for the purposes mentioned, and must be exacted in good faith to meet the expense of regulation and not for the purpose of raising revenue. In so acting the legislature proceeds under the police power of the state. In the exercise of the police power the legislature is of course not restricted by the limitations placed upon the taxing power and it is for that reason that the validity of laws exact-

ing license fees is not effected by provisions in the organic law relating to taxes. Such license fees are not taxes and depend for their validity not upon a compliance with constitutional requirements relating to taxes, but upon the question of whether the regulation in connection with which they are exacted is reasonably necessary to promote the public health, public morals or public safety.

Not so in the case of license taxes. These have nothing to do with the public health, public morals or public safety, in imposing license taxes the object and aim of the legislature is the collection of revenue. In character a license tax does not differ form any other tax. It is levied against the occupation or business of the person called upon to pay it just as a property tax is levied against the property of the person called upon to pay such tax, the object in each case being the production of revenue for the support of the government. The only difference between a license tax and a property tax lies in the procedure provided for enforcing the collection of the tax.

The collection of a property tax can be enforced by a seizure and sale of the property taxed. Collection of a license tax cannot be thus enforced because of the intangible character of the occupation or business which forms the subject of the tax. The only practical method by which the collection of this tax can be enforced consists in providing that it shall

be an offense to pursue the occupation or business taxed without first paying the tax.

The procedure followed is similar to that pursued in the collection of license fees under the police power. A license is required but this license performs no office except that it serves as a receipt for thhe taxes paid. When a license is granted under the police power it serves as a permit to do that which without th license would be unlawful because of its harmful effect upon the public health, public morals or public safety if permitted to be done without the restraint of the license and proper regulation thereunder—a right is conferred upon the recipient of the license which he did not have before it was issued. When, however, a license is issued to one in connection with the payment of a license tax no new right is conferred upon the recipeient. The occupation or business licensed is not one which requires regulation and restraint in order to prevent injury to the public health, morals or safety, but is a useful one by which the Public health, morals and safety, as well as the public welfare ~~is~~ are promoted. The recipient of the license had a right under the constitution to follow an occupation or business of this character without a license just as one has the right to the ownership and enjoyment of private property without a license. In exacting the license tax the government merely exercises its right to levy a tax against the occupation or business of the citizens for the purpose of

defraying the expense of government, just as it levies a tax against the property of the citizens for such purpose. Nothing more, nothing less. There is no difference between a license tax and a property tax. The apparent difference arises from the fact that in one case the thing is tangible, in the other intangible, which necessitates different methods of procedure when it comes to enforcing collection. Both are taxes in every sense of the word and being taxes must conform to the requirement of the orgainc law as to uniformity and assessment according to value unless, indeed, the provsiions containing these requirements differ from those contained in the organic act of Alaska in that they are so worded as to be limited to one or to exclude the other.

There is no similarity between license fees exacted under the police power and licens taxes exacted under the taxing power, although the method of procedure for their enforcement may be the same. As was said by Judge Cooley in his work on taxation page 396, "The distinction between a demand of money, under the police power, and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in

classifying the case, and referring it to the proper power."

It will be seen therefore that the decisions that relate to license fees exacted under the police power have no application to the facts in this case. (Throughout this discussion the nomenclature found in most of the cases upon the subject, is followed; that is to say money axactions under the police power are referred to as "license fees," while those under the taxing power are referred to as "license taxes." In some of the caess the terms, license fees, license taxes and occupation taxes are all used, sometimes interchangeably, where money exactions under the police power are referred to.)

The various provisions contained in the organic laws of the various states and territories will next be discussed with a view of determining the applicability and effect of the decisions under each.

The constitution of the State of Alabama contains the following provisions: "All taxes levied on property in this state shall be assessed in exact proportion to the value of such property . . . . . The legislature shall not enact any law which will permit any person, firm, corporation or association to pay a privilege, license or other tax to the State of Alabama, and relieve him or it from the payment of all other privilege and license taxes in the state."

The constitution of the State of Arkansas provides as follows: "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper."

The constitution of the State of Florida provides as follows: "The legislature shall provide for a uniform and equal rate of taxation and shall prescribe such regulations as shall secure a just valuation of all property . . . . . The legislature may also provide for levying a special capitation tax and a tax on licenses."

The constitution of the State of Illinois contains the following provisions: "The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, such value to be ascertained by some person or persons, to be selected or appointed in such manner as the General Assembly shall have power to tax peddlers, auctioneers,

brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests, or business, vendors of patents and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

The constitution of the State of Idaho contains the following provisons: "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, or her, or its property, except as in this article hereinafter otherwise provided. The legislature may also impose a license tax (both upon natural persons and upon corporations, other than municipal, doing business in this state); also a per capita tax . . . . . All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation of all property, real and personal."

The Montana Constitution provides as follows: "The necessary revenue for the support and maintenance of the state shall be provided by the Legislative Assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such

regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The Legislative Assembly may also impose a license tax, both upon persons and upon corporations doing business in the state."

The constitution of Nebraska contains the following provision: "The Legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the tax to be ascertained in such manner as the Legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct, uniform as to the class on which it operates."

The constitution of the state of Louisiana contains the following provision: "Taxes shall be equal and uniform throughout the limits of the authority levying the tax, and all property shall be taxed in proporition to its value." Provision is also made for a license tax, to be graduated upon persons pursuing the several trades, professions, vocations, and callings. All occupations may be liable to such tax except those of clerks, laborers, clergymen, school teachers, those engaged in mechanical, horticultural,

agricultural, and mining pursuits, and manufacturers, other than those of distilled, alcoholic, or malt liquors, tobacco, cigars, and cottonseed oil.

The constitution of the state of North Carolina provides as follows: "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property . . . . . And provided, further, That the General Assembly may provide for a graduated tax on incomes, and for a graduated license on occupations and business."

The constitution of the state of Texas contains the following provision: "Taxation shall be equal and uniform. All property in this state, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The legislature may impose a poll-tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this state. It may also tax incomes of both natural persons and corporations, other than municipal, except that persons engaged in mining and agricultural pursuits, shall never be required to pay an occupation tax."

The constitution of the state of Tennessee provides: "All property shall be taxed according to its

value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value, but the Legislature shall have power to tax merchants, peddlers and privileges, in such manner as they from time to time direct."

The constitution of the state of Utah provides as follows: "The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money . . . . . Nothing in this constitution shall be construed to prevent the legislature from providing a stamp tax, or a tax based on income, occupation, licenses, franchises, or mortgages."

The constitution of the state of Virginia provides as follows: "All property, except as hereinafter provided, shall be taxed, all taxes, whether state, local, or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws . . . . . The General Assembly may levy a tax upon incomes in excess of $600 per annum; may levy a license tax upon any business which cannot be reached by the ad-valorem system."

The constitution of the state of West Virginia contains the following provision: "Taxation shall

be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value, to be asecrtained as directed by law . . . . . The Legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations."

The constitution of the State of Kentucky contains the following provisions: "Taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws. All property shall be assessed at its fair cash value. All property, whether owned by natural persons or corporations shall be taxed in proportion to its value . . . . . The General Assembly may by general laws only provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

The organic act of the Territory of Oklahoma provides as follows: "Nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to the taxation shall be taxed in proportion to its value: Provided, That nothing herein shall be held to prohibit the levying and collecting license or special taxes in the

territory from persons engaged in any business therein, if the legislative power shall consider such taxes necessary."

It will be observed that the constitution of each of the states above referred contain express provisions authorizing the collection of license taxes. The language employed varies, but in each case it is clear that the framers of the constitutions intended to authorize the legislature to impose and collect license taxes for the purpose of revenue as distinguished from license fees exacted in connection with the requirement of a license for the purpose of regulation. It is needless to say that the courts in the states above mentioned have uniformly held that the legislature had the power to raise revenue by means of a license tax. Even in the states mentioned, however, it has been quite generally held that license taxes must be uniform upon the same class of subjects.

While the decisions of the courts under constitutions containing express provisions authorizing the enactment of laws requiring license taxes can have no application to a case arising under the organic act of Alaska, where no such provision exists, it is a noteworthy fact that the framers of these constitutions deemed it necessary to insert these express provisions in order to reserve the right to collect revenue by means of license taxes. Obviously they took the position that the insertion of the provisions with reference to uniformity and assessment accord-

ing to value would destroy the right to collect license taxes unless that right was expressly reserved. No other reason can be assigned for the action taken.

A consideration of the Oklahoma organic act discloses the fact that Congress also took the view that unless the right to collect revenue by means of license taxes was expressly reserved, that right would be destroyed by the insertion in the organic act of a provision requiring uniformity and assessment according to value. Had it been the intention of Congress to permit the Alaska Legislature to raise revenue by means of license taxes it would have taken the same action that it took in the case of Oklahoma and reserved that right by a similar provision. The failure of Congress to reserve to the Alaska Legislature this right is, however, easily accounted for.

An examination of the organic act will disclose the fact that the powers conferred upon the Alaska Legislature are everywhere limited and circumscribed and the limitation upon the power to levy taxes without reserving the right to raise revenue by means of license taxes is in harmony with the general purpose of Congress to limit the power of the legislature as expressed by the organic act, taken as a whole. The sparsely settled condition of the territory, its vast extent and other peculiar conditions not met with elsewhere are the reasons that suggest themselves for thus limiting the power of the Territorial Legislature. In denying the right to raise revenue by means of license taxes, Congress

must ~~had~~ have had in mind not only the peculiar conditions existing in the territory, but also the unusual provisions of the organic act with reference to representation in the legislature made necessary because of these peculiar conditions. Under the provision of the organic act each judicial division, regardless of its population, or wealth, is allowed four representatives in the lower house and two in the upper house of the legislature; that this arbitrary apportionment of the ~~members~~ number of representatives to which the various parts of the territory should be entitled in the legislature might lead to serious abuses in connection with the imposition of license taxes, must have been apparent to Congress.

The industries carried on in the territory are such that each is carried on in its own peculiar locality and not elsewhere, at least not to any extent, so that a license tax on any industry falls on the particular locality only in which that industry is carried on. The temptation of working for and voting for a license tax on an industry not carried on in his division is constantly held out to each member of the legislature.

The mines and the fisheries form the basis of all industrial activity in the territory. The fisheries are located along the coast in the first and third divisions and the quartz mines also are located near the seashore in these same divisions, while the placer mines are found in that portion of the third division extending back into the interior and in the second and fourth divisions. Thus a license tax imposed

upon the fisheries burdens the coast regions of the first and third division only, a license tax on the quartz mines operations falls exclusively upon the same localities, while a license tax upon placer mine operations effects only the second and fourth divisions and that part of the third division which extends into the interior.

Not only must Congress be presumed to have had these things in mind but also the fact that a license tax is a convenient tax to impose and that its burdens fall upon a limited number only who are not always represented in the legislature, and that in imposing such taxes the legislature would only be following naturally along the lines of least resistance and greatest traction.

The members of the legislature that passed the law under consideration undoubtedly acted in the best of faith. They were undoubtedly honest men who acted honestly. Yet the injustice and inequality resulting from this character of taxation, regardless of the honesty and good faith with which it is invoked, and against which Congress undoubtedly intended to protect the people of Alaska, becomes apparent when the present law is examined.

The legislature never made any provision for the levying of any property tax whatsoever. All the money required to pay the expense of the Territorial Government is sought to be collected by means of license taxes. No substantial license tax is exacted from anyone engaged in any industry except the

mines and fisheries. Nor are all the mines taxed, the mines are not taxed unless they yield a net income in excess of five thousand dollars per annum. The low grade character of the quartz mines makes it necessary to employ larger units in connection with their operations. Enormously large capitals are required to successfully operate these mines, and of course, if the operations prove successful, the income is correspondingly large, so that the five thousand dollar exemption makes no practical difference one way or the other. The placer mines on the other hand are operated in small units so that while there are comparatively few quartz mines in operation the number of placers in operations is almost infinite, and while the aggregate yield of the placers may exceed that of the quartz mines, the yield of any one placer is comparatively small and does not except in isolated cases produce a net income of more than five thousand dollars. And even where the net income exceeds five thousand dollars it must always be a difficult matter to collect a tax thereon in view of the fact that, ~~it~~ as is a matter of common knowledge, ~~that~~ accurate books of account are rarely kept in connection with the conduct of small individual enterprises. It follows that under this law the fisheries and the quartz mines situated along the coast in the third and first divisions are called upon to pay all but a very small per cent. of the taxes required to meet the expense of the Territorial Government. This in spite of the fact that the

fisheries are also required to pay a tax to the federal government under the act of June 1906 and the quartz mines are required to pay a tax to the federal government of three dollars per stamp under the act of Congress.

The constitutional provisions in any wise similar to the provision in the Organic Act of Alaska, found in the various state constitutions, and unaccompanied by other express provisions limiting their effect so as to have no application to license taxes or providing in express terms for the imposition of license taxes, will next be considered together with the decisions of the state courts thereunder:

The constitution of the State of California contains the following provisions:

> "all property in the state not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property' as used in this article and section is hereby declared to include moneys, credits, bonds, stocks, franchises and all other matters and things, real, personal and mixed, capable of private ownership."
>
> "The Legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations or upon the inhabitants or property thereof for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authori-

ties thereof the power to assess and collect taxes for such purposes."

The constitution also expressly provides that income taxes may be assessed and collected.

The provisions of the constitution of California first above quoted are not only expressly limited in their application to property taxes, but the meaning of the word "property" as therin used in expressly defined. Under the decisions of the state courts generally, which differ in that regard from the decision rendered by the Supreme Court of the United States in the case of Welton vs. State, 91 U. S. 278, hereinbefore referred to, license taxes are not regarded as taxes upon property. They are regarded as taxes upon occupations, and these occupations are in turn regarded as intangible things separate and distinct from the property used in pursuing such occupations. Viewing license taxes in this light, constitutional provisions which are expressly limited in their application to property taxes, such as is the provision in the California Constitution above quoted, can have no application to license taxes, since these are not regarded as taxes upon property. There is then in the California constitution no provision to which license taxes must conform. The decisions under that section of the constitution prohibiting the imposition of taxes on counties, cities, etc., however, shed light upon the meaning of the words "all taxes" as employed in the Organic Act of Alaska.

The legislature of the State of California had

passed a law requiring those engaged in certain kinds of businesses to take out a license and pay therefor fixed sums which were to be turned into the county treasury. This law was before the Supreme Court of California in the case of People vs. Martin, 60 Cal. 153. Its validity was assailed on the ground that the legislature had no power under the constitution to collect taxes for county purposes. It was contended that the license tax imposed was not a tax within the meaning of the constitution. It will be observed that the constitutional provision is not limited in its application to property taxes in that the taxes prohibited are those "upon the inhabitants or property thereof." This clause in the constitution, the Supreme Court of California held included not only property taxes, but also license taxes which were taxes upon the inhabitants. This act was held void. In passing upon this matter, Judge Ross, who was then a member of the Supreme Court of California, speaking for that Court, says:

> "The important question in the case is, whether or not the word 'taxes' as used in this section of the constitution includes license taxes; for, if it does, the provisions of the Political Code imposing and providing for the collection of the license tax here in question, are clearly inconsistent with this section of the constitution, and therefore inoperative by virtue of Section I of Article XXII of the same instrument.
>
> "That the license fees imposed by the pro-

visions of the Political Code were so imposed mainly, if not solely, for the purpose of revenue, does not admit of doubt; and where that is the case, they are, in effect, taxes. (Cooley on taxation, pages 396-7; 2 Dillon on Mun. Corp. Sec. 768.) Indeed, the statute itself designates the charge as a license tax. (Political Code, Sec. 3,359.)

"But are they 'taxes' within the meaning of Section 12 of Article XI, of the Constitution? We are of the opinion that they are. It is clear that that section is not limited to taxes upon property; for by its express language the legislature is prohibited from imposing taxes upon the inhabitants of counties, cities, towns, or other public or municipal corporations, as well as upon their property, for county, city, town, or other municipal purposes. The defendant is an inhabitant of the county of Santa Cruz, engaged in the business of selling goods, wares, and merchandise. The tax imposed upon him, and which it is proposed to collect, was undoubtedly imposed for county purposes; for as already observed, the statute authorizing it, required the tax when collected to be paid into the County Treasury for the use of the County General Fund. The power to impose such taxes for such purposes, in our opinion, no longer remains with the Legislature;"

This decision is especially applicable to the pres-

ent case in that it clearly shows the reason why some of the provisions in the various state constitutions are not applicable to license taxes. These provisions are limited to taxes on property by their express terms just as is the first provision above quoted from the California Constitution. But the provision before the Court in this case was not so limited but applied to taxes on the inhabitants and taxes on the property alike, which made it in all respects similar to the provision in the Alaska Organic Act, which is applicable by its terms to "all taxes" without regard to their character.

One of the judges then a member of the Supreme Court of California dissented from the majority of opinion, taking the same view that the learned trial court took in this case, that license taxes were to be distinguished from other taxes in some manner and were not to be regarded as included within constitutional provisions relating to taxes, a view that resulted from confusing license taxes exacted under the taxing power with license fees exacted under the police power.

The Supreme Court of California in rendering subsequent decisions, however adopted the views expressed by Judge Ross and concurred in by the majority of the court as law. See Ex Parte Schuler 139 Pac. 985. And the Supreme Court of Missouri in construing a constitutional provision containing the same language, as will be pointed out when the provisions of the constitution of that state are discussed, adopted the same construction.

The constitution of the State of Colorado provides as follows:

> "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected under general laws, which shall prescribe such regualtions as shall secure a just valuation for the taxation of all property real and personal."

Under this constitutional provision it has been held in Colorado that a license tax can be laid and collected. It will be observed that the constitutional provision contains the following "which shall prescribe such regulations as shall secure a just valuation for the taxation of all property real and personal." This provision of course by its terms is applicable only to property taxes.

The constitution of the State of Delaware provides as follows:

> "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws,"

The effect of this constitutional provision does not seem to have been passed upon by the Supreme Court of Delaware in so far as it affects license taxes.

The constitution of the State of Georgia provides as follows:

> "All taxes shall be uniform upon the same

class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax and shall be levied and collected under general laws."

It will be observed that under this constitutional provision all taxes, without regard to their character, are required to be uniform upon the same class of subjects. It is accordingly held by the Supreme Court of Georgia that license taxes must conform to this provision. It will be further observed that the requirement that taxes shall be ad valorem is expressly limited to property taxes. Under this constitutional provision therefor licenses taxes are excepted from the provision that taxes must be according to value. This constitutional provision therefore permits the levying of licenses taxes, though such taxes are not levied according to value, or ad valorem provided they are uniform upon the same class of subjects, and this has been the construction placed upon the provision by the Supreme Court of Georgia.

The Supreme Court of Georgia, however, went somewhat further and held that where a license tax on merchants was graduated in proportion to the volume of business transacted, the tax should be according to value, notwithstanding the fact that the constitutional provision requiring taxes to be ad valorem was limited expressely to property taxes. The Court say: "It is true that the clause cited in words applies to property, but in sense and spirit we think it covers a business tax scaled by the amount or value

of the business transacted." Johnson vs. Macon, 62 Ga. 645. In this case it was further held that a license tax law graded in proportion to the amount or value of business transacted as above indicated was not sufficiently uniform upon the same class of subjects.

The constitution of the State of Indiana provides as follows:

> "That the general assembly shall provide by law for a uniform and equal rate of assessment and taxation and shall provide such regulations as shall secure a just valuation for taxation of all property both real and personal."

The provisions of this constitution it would seem are clearly limited so as to apply to property taxes only. Nevertheless the Supreme Court of Indiana in the case of Henderson vs. London & Lancashire Ins. Company, 135 Ind. 24, held that a tax on the business of such foreign insurance companies as are doing business in counties having cities with paid fire departments, which tax is to create a fireman's fund, violates the constitutional provision requiring equality and uniformity of taxation as it applies only to a portion of the class of foreign insurance companies, and the power of the whole state is thus exercised on a portion of the class for the benefit of a small part of the citizens of a few cities of the state. This decision indicates the tendency of the courts to apply the constitutional provisions of this character to license taxes wherever possible.

The constitution of the state of Kansas provides as follows:

> "The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property to the amount of at least two hundred dollars for each family shall be exempted from taxation."

This constitutional provision by its terms deals with taxation of property only and accordingly the Supreme Court of Kansas held that it did not apply to license taxes.

The constitution of the State of Maine contains the following provision:

> "All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just valuation thereof."

This provision like that contained in the Indiana Constitution is by its terms limited in its application to taxes on real and personal estate and does not therefor apply to licenses taxes.

The constitution of the State of Minnesota provides as follows:

> "All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform

throughout the state . . . . . Laws shall be passed taxing all moneys, credits, investments, in bonds, stocks, joint-stock companies or otherwise, and also all real and personal property, according to its true value in money."

It will be noted that the provision in this constitution requiring equality applies to all taxes alike, but that the remaining provisions requiring levies to be made according to cash valuation, and taxes to be assessed according to value are expressly limited in their application by the terms of the provision to property taxes. It was accordingly held by the Supreme Court of Minnesota that all license taxes must be uniform, and further that all taxes upon property must be assessed according to value. Willis v. Standard Oil Co., 52 N. W. 652-4; In Re Tax Delinquency in St. Louis County, 75 N. W. 970; Minces v. Schoenig, 75 N. W. 711;

In the case of Willis v. Standard Oil Company, the Supreme Court of Minnesota was called upon to pass on the validity of a law providing for the payment of a fee to inspectors of oils. All oils shipped in and used for illuminating purposes were required to be inspected and the inspector was, for such inspection, entitled to certain fees. The objection was made that the fees exacted were exacted for the purpose of revenue and that the measure was in fact a measure designed to raise revenue. The Court held if that were the object of the measure, it could not be sustained under the constitutional provision. The

court says: "It is also objected that the act is one levying a tax, and not a police regulation. Of course, under the constitutional provision requiring taxes to be as nearly equal as may be, and to be levied on a cash valuation, the law could not be sustained as a tax law. It can only be upheld as an exercise of the police power of the state;"

In the case of in Re Tax Delinquency in St. Louis County, the Supreme Court of Minnesota passed upon a law providing that mining companies might pay in the state treasury annually, in lieu of all taxes or assessments upon capital stock, personal and real estate, of such companies in or upon which real estate such business of mining might be carried on, or which was connected therewith, and set apart for such business the following amounts, to-wit: For each ton of copper, fifty cents, and for each ton of iron ore mined, shipped or disposed of, one cent. The court held that under the Minnesota Constitution the act was void, and in passing upon the matter they say: "It would be difficult to conceive of a system of taxation more obnoxious to the Constitution."

In the case of Minces v. Schoenig, the court had before it an ordinance passed by the City of Winona which contained the provision that those who conducted bankrupt sales were to obtain a license and in addition to the payment of such fee, justified under the police power, were required to pay a tax of two per cent. of the amount of the gross receipts.

In holding this ordinance void, the court says: "This mode of taxing is so palpably in conflict with Section 1, Article 9 of the Constitution which requires that all property on which taxes are to be levied shall have a cash valuation, that it cannot stand for a moment. The legislature itself has not power to adopt any such system of taxation, or to grant authority to a municipality to do so."

The constitution of the State of Michigan contains the following provisions:

> "The legislature shall provide an uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law . . . . . All assessments hereafter authorized shall be on property at its cash value.
>
> "The legislature shall provide for an equalization of a state board in the year 1851, and every fifth year thereafter, of assessments on all taxable property except that paying specific taxes."

The Supreme Court of Michigan held that the terms "specific tax" used in the constitution provision embraced license taxes, a license tax being of course a specific tax on business.

Under the constitution of the State of Massachusetts the legislature is empowered

> "to impose and levy proportional and reas-

onable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities, whatsoever, brought into, produced, manufactured, or being within the same."

The effect of this constitutional provision was before the Supreme Court of Massachusetts in the case of Portland Bank v. Apthorp, 12 Mass. 252-256. The legislature had enacted a law taxing banks one-half of one per cent. on the amount of their capital stock. In discussing the validity of this law in the light of the constitutional provision, the Supreme Court of Massachusetts hold that the tax could not be justified under the first part of the provision and in that connection the court say: "Under the first branch of this power, namely, that of imposing and levying rates and taxes, the requisition upon the banks cannot be justified; for those taxes must be proportional upon all the inhabitants of, and persons resident and estates lying within, the Commonwealth. The exercise of this power requires an estimate or valuation of all the property in the Commonwealth; and then an assessment upon each individual, according to his proportion of that property. To select any individual or company, or any specific article of property, and assess them by themselves, would be a violation of this provision of the constitution."

It will be observed from the language quoted that the assessment of a license tax would be considered as prohibited under the constitutional provision if the first portion of the provision alone were considered, yet this portion of the constitution of Massachusetts does not as clearly and definitely apply to all taxes alike as does the provision in the Alaska organic law.

The tax in question was, however, upheld by the Supreme Court of Massachusetts on the ground that the subsequent portion of the provision in the Massachusetts constitution allowed the collection of excises on commodities. The term "commodity" was given a broad meaning, so broad indeed as to include everything on which a tax could be laid. The court justified its action in so construing the word "commodity" on the ground that the legislature had always so construed it since the adoption of the constitution itself thirty years ago. This was considered by the court as being sufficient evidence to show that the framers of the constitution must have intended to give this meaning to the word "commodity."

The constitution of the State of Mississippi provides as follows:

> "Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value . . . . . Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

It will be noted that the provision requiring uniformity and equality applies to taxes generally, while the remaining provisions are limited by their terms to property taxes.

The constitution of the State of New Hampshire gives the General Court power

> "to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of, and residents within, the said state, and upon all estates within the same."

Under this provision of course a license tax can be imposed as, "it is a tax," as the Supreme Court of California held in the case of People v. Martin, "upon the inhabitants." Nevertheless the Supreme Court of New Hampshire held that these taxes must be uniform. State v. Pennoyer, 65 N. H. 113; 18 Atl. 878. In this case the Supreme Court of New Hampshire had before it a law requiring physicians to procure a license and pay a stipulated amount therefor. The law did not apply alike to all physicians and was accordingly held void as lacking in uniformity.

The constitution of the State of Missouri contains the following provisions:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and all taxes shall be levied and collected by general laws.

"All property subject to taxation shall be taxed in proportion to its value.

"The General Assembly shall not impose taxes upon counties, cities, towns, or other municipal corporations or upon the inhabitants thereof or property thereof, for county, city, town or other municipal purposes, but may by general laws vest in the corporate authorities the power to collect and assess taxes for such purposes."

It will be noted that this constitution, like practically all the other constitutions, and unlike the Alaska organic act, contains two separate provisions, one applying to taxes generally and the other to property taxes only. It is similar to the Alaska organic act in that all taxes are required to be uniform upon the same class of subjects. It differs from the Alaska organic act in that under it all property subject to taxation shall be taxed in proportion to its value, while under the Alaska provision "all" taxes must be assessed according to the value of the thing which is the subject of taxation. This constitutional provision is construed by the courts so as to carry out the meaning so clearly expressed and license taxes are included within the provision, where taxes generally are referred to and are required to be uniform upon the same class of subjects.

In the case of City of St. Louis v. Spiegel, 2 S. W. 839, it was held that license taxes must under the Missouri constitution be uniform upon the

same class of subjects. An ordinance had been passed by the City of St. Louis providing for a license tax of $25 on meat shops situate in one part of the city and $50 on meat shops situate in another part of the city. It was held that this license tax violated the constitutional provision requiring uniformity.

The constitutional provision providing that the legislature shall not tax counties, cities, etc., or the inhabitants or property thereof, for county, city, town or other municipal purposes, is in all respects like the provision upon that subject contained in the California constitution, and the Supreme Court of Missouri placed thereon the same construction previously placed on a similar provision by the Supreme Court of California. State Ex Rel Wyatt vs. Ashbrook 72 Am. St. Rep. 765.

It was claimed in this case that an act of the Missouri legislature requiring a license tax from department stores was void for two reasons. First that the legislature had no power to pass the law since two-thirds of the revenue derived under it was paid into the city treasury, the law being therefor designed to raise revenue for municipal purposes and being imposed upon the inhabitants of the cities. And for the further reason that it lacked uniformity in that it applied only to department stores. The Supreme Court of Missouri held that the act violated the constitution in both respects. This decision, like the decision by the Supreme Court of California, is

important in that it is held that the term "tax" when used in the constitution includes license taxes unless it is expressly restricted to property taxes. As in California the tax therein prohibited was any tax on the inhabitants or property. In Alaska the term used is "all taxes" which is equally comprehensive.

The constitution of the State of Nevada provides as follows:

> "The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessory."

This provision by its terms requires no more than a just valuation for taxation of all property, real personal and possessory, and has of course no application to license taxes.

The constitution of the State of New Jersey provides as follows:

> "Property shall be assessed for taxation under general laws and by uniform rules according to its true value."

This provision also is limited in its application to the taxation of property.

The constitution of North Dakota provides as follows:

> "laws shall be passed taxing by uniform rule all property according to its true value in money."

The terms of this provision also expressly apply to the taxation of property only.

The constitution of the State of Ohio provides as follows:

> "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all real and personal property, according to its true value in money;"

It will be observed that the provisions in the Ohio constitution are such that they apparently relate to property taxes only yet the Ohio courts have persistently justified non-uniformity in connection with money exactions for licenses on the ground that they were exacted under the police power, indicating thereby that exactions under the taxing power would be required to be uniform.

The Ohio decisions are reviewed in the opinion in the case of Pittsburg, C. & St. L. R. R. Co. v. State, 30 N. E. 435. An act passed by the Ohio Legislature required every corporation or company operating a railroad or any part of a railroad within the state to pay to the Commissioner of Railroads and Telegraphs a fee of $1.00 per mile for each mile of track operated by it within the state. The constitutionality of this act was assailed on the ground that it levied a specific tax on property. It was contended that the money sought to be collected was a fee and not a tax and did not come within the constitutional inhibition. In support of this contention, it was urged that the Supreme Court of Ohio in a pre-

vious decision had held that a license fee exacted from gas companies did not come within the constitutional inhibition requiring uniformity. The Supreme Court of Oho reviewed this early decision indicating that the gas business was a business that required police supervision; that the law imposing the exaction upon the gas companies provided for numerous kinds of regulation and that the license fee required from the gas companies was required in order to pay the cost of this regulation under the police power. It was further shown that the decision of the court in that case was based upon that ground and the law sustained as an exercise of the police power. The court then proceeded to apply this theory of the law to the facts in the case. It was pointed out that the law under consideration did not provide for any regulation and that the exaction of $1.00 per mile was a tax pure and simple and that its nature as a tax was not affected by the fact that it was called a fee. The court say: "A tax is a pecuniary burden imposed for the support of the government . . . . . Burdens or charges imposed by the legislative power of a state upon persons or property to raise money for public purposes. The money raised by this section under consideration is directed to be paid into the state treasury; it becomes a part of the funds of the state applicable to any conceivable public purpose. There is not a word in the section under consideration, or in the act to which it is supplementary, to indicate a purpose that the

fund raised shall be limited, or even in any way specially applied, to the expenses incurred in supervising the railroads of the state. A law like this—the direct and only purpose it can accomplish, being to create a fund by an exaction on property to be paid into the state treasury to be used indiscriminately for any and all public purposes—must be regarded as creating a tax. It bears no resemblance to, and should not be confounded with, that class of laws enacted by the legislature, the immediate object of which is to call into active operation the police powers of the state, but which, incidentally or indirectly, may cause the production of public revenue."

The constitution of the State of Oregon provides as follows:

> "No tax duty shall be imposed without the consent of the people or their representatives in the Legislative Assembly; and all taxes shall be equal and uniform.
>
> "The Legislative Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal . . . . . ."

It will be observed that the only provision in the Oregon constitution that applies to all taxes is the provision requiring equality and uniformity. The other provisions are expressly limited in their applicaton to taxaton of property, real and personal. All

that would be required of a license tax under this provision is equality and uniformity. Taxes on property, however, both real and personal are required to be in accordance with a just valuation.

In deciding the case of Ellis v. Frazier, 63 Pac. 642, the Supreme Court of Oregon was called upon to pass on the validity of a tax under the Oregon constitution. A law had been passed by the Oregon legislature requiring the owners of bicycles to pay a tax of $1.25, whereupon they were furnished with a tag indicating that the tax had been paid, which was to be attached to the bicycle for and on account of which it had been collected. It was contended that this was an exaction that did not come within the constitutional inhibition. But the court held it was a tax and that for that reason it was void as lacking uniformity since bicycle owners in certain counties only were required to pay it. And furthermore that it was a property tax and for that reason violated the constitutional inhibition that property taxes must be ad valorem or assessed according to value. In passing upon this question the Supreme Court of Oregon say: "As a preliminary matter, it is important to consider whether the burden thus imposed upon bicycle owners is a tax or a license; for, if the latter, it is no inhibited by the provisions of the organic act relied upon, the courts generally holding that the constitutional requirement as to uniformity of taxation has no reference to the taxation of occupations." (It must be noted that the

Supreme Court of Oregon used the term "license" and the term "occupation tax" interchangeably as referring to exactions under the police power and not to exactions under the taxing power; that what is usually spoken of as a license tax is not included within the meaning of either of the terms as used by the Oregon Supreme Court. This is evident from the context.) Continuing the court say: "The legislative assembly has referred to the levy as a tax, but the descriptive designation is unimportant; for the object sought to be attained by the enactment must determine the character of the exaction. 'The distinction between a demand of money, under the police power, and one made under the power to tax,' says Judge Cooley, 'is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation, and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case, and referring it to the proper power.' Cooley, Tax'n. 396. It was held, in the case of In re Wan Yin (D. C.) 22 Fed. 701, that whenever it is manifest that the fee for a license to conduct an occupation is substantially in excess of the sum necessary to cover the cost of issuing the license and the incidental expense attending the regulation of the business, the burden is a tax, and not a license." The court then proceeded to review other similar cases and continuing say. "Whatever the

rule may be in respect to the granting of licenses which incidentally result in producing a revenue, or the law in relation to the authority of a municipal corporation in the maintenance of its streets, it cannot reasonably be inferred that the burden imposed by the act in question was an exercise of the police power of the state; for the use of a bicycle does not necessarily tend to the destruction of the highways. We do not wish to be understood as intimating that the sum of one dollar more than the cost of executing the necessary receipts and supplying the requisite tags is an unreasonable exaction, but, inasmuch as that sum is set apart from each collection as a fund for the purpose of constructing and maintaining bicycle paths, it is evident, we think, from a consideration of the entire act, that it was primarily designed as a means of raising revenue, and the burden thus imposed must therefore be treated as a tax, and not a license." It was then held that since bicycles differ greatly in value, the tax violated the provision requiring uniformity and equality. The court say: "The value of all bicycles not being the same, the tax of $1.25 upon each destroys the required uniformity in the assessment, and renders the rate of taxation unequal, so that the tax in this respect violates the constitutional provision above quoted." As has been elsewhere shown in this brief the act was also held to violate the constitutional provision that property must be taxed according to value, the court holding that this tax was in fact a tax on the property itself.

Later on the Supreme Court of Oregon had occasion to pass upon the act of the legislature more or less similar in character, Reser v. Umatilla County, 86 Pac. 595. In this case the court had before it an act which required the nonresident owners of sheep bringing sheep into the state for pasturage or for the purpose of driving such sheep through the state, to pay a tax of a fixed sum per head. It was urged by the Attorney General that the exaction was made under the police power of the state and was not therefor subject to the limitations imposed by the constitution with reference to the collection of taxes. But the court held the exaction to be a tax and held the tax void as lacking in uniformity and as having been levied without regard to valuation. In the course of the opinion it said: "It is sometimes difficult to distinguish between a tax and a license. Generally speaking, a tax is a charge or burden imposed on persons or property for the support of the government or for some specific purpose authorized by it. Its object is to raise revenue. A license, however, is a permission to do what would otherwise be unlawful. The fee or charge often exacted therefor is in law supposed to cover the cost of issuing the license and the expense incident to regulating and controlling the business, although it may ultimately result in a source of revenue. To relieve a law, imposing a burden or tax upon persons or property, from the operation of the constitutional provision relative to taxation, it must have for its primary ob-

ject the granting of some privilege or the imposing of some restraint."

It will be noted that in each of these cases the law before the court levied a specific tax on property. Such taxes in common with all other taxes were required by the constitution to be equal and uniform, since the clause requiring equality and uniformity applied to all taxes alike and being property taxes they were required to be assessed according to value, since by the provisions of the constitution property taxes are required to be so assessed. However, since the constitutional provision requiring assessment according to value is expressly limited in its application to property taxes, there would seem to be no good reason why a license tax could not be collected in Oregon if such tax were equal and uniform unless the view were adopted expressed by the Supreme Court of the United States in the case of Welton v. State that these taxes on business were in effect a tax on the property employed in connection with such business. The Supreme Court of Oregon seems to have taken this view of the matter, for while the taxes before the court were not license taxes, but specific property taxes, the opinion in each case contains a discussion of the validity of specific taxes generaly including license taxes and leads to the conclusion that under the Oregon constitution no money can be exacted except in the form of ad valorem property taxes unless the exaction be made in the exercise of the police power of the state.

The constitution of the State of Pennsylvania provides:

> "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax and shall be levied and collected under general laws."

This constitution contains no provision requiring assessment according to value, the only provision contained being one requiring uniformity upon the same class of subjects and this, like the provision in the Alaska Organic Act, applies to all taxes alike. Accordingly it is held by the Supreme Court of Pennsylvania that occupation or license taxes come within its requirements and must be uniform. Banger's Appeal 109 Pa., St. 79.

In this case the court had before it an ordinance of the city of Williamsport under which it was sought to collect an occupation tax, the amount of which was in each case determined by the income of the person taxed. The ordinance was held to be invalid on two grounds: First, that the tax was in fact the income tax and that while the city of Williamsport had authority to levy occupaetion taxes, it had no authority to levy income taxes. Second, that the constitution of the state required all taxes to be uniform upon the same class of subjects; that the tax in question, regardless of its character, was not uniform upon the same class of subjects and was therefore void as failing to comply with this constitutional requirement. The court, discussed at

some length the manner in which occupation taxes could be levied so as to comply with the constitutional requirement of uniformity and the reason why the tax before the court did not answer this requirement. In referring to the opinion expressed by the lower court to the effect that the tax complied with the requirement of uniformity, the Supreme Court say: "These views of the learned court are well enough as far as they go, but they do not come to the proper standard of uniformity. However, they might have been regarded prior to the adoption of the present constitution. They do not conform to the requirements of the organic law as it exists at the present time. That requires not merely that there shall be no exemption of persons or classes, but that upon persons and classes the tax shall be uniform."

The constitution of the State of South Dakota provides as follows:

> "All taxation shall be equal and uniform. All taxes to be raised in this state shall be uniform on all real and personal property, according to its value in money."

It will be observed that the constitution contains a uniformity clause that applies to all taxes alike, while the clause requiring taxation according to value is limited by its terms to taxes on real and personal property. It was accordingly held by the Supreme Court of South Dakota that since the clause requiring equality and uniformity applied to all taxation, license taxes must be equal and uniform. In

Re Watson 97 N. W. 465. In this case the court had before it a law requiring a license tax from peddlers, exempting peddlers of nursery stock and other classes of peddlers from its operation. It was contended that this tax lacked uniformity and was therefor obnoxious to the constitutional provisions requiring uniformity in the case of all taxation. On the other hand it was argued that in some jurisdictions the uniformity clauses were not applied to license taxes. The Supreme Court of South Dakota however held that such contention could not be maintained under the provision of the constitution of that state, which did not expressly limit the requirement of uniformity to property taxes, but provided that all taxes must be uniform. In reference to this matter the court say:

"Such position cannot be taken in this state. The clause 'and all taxation shall be equal and uniform', found in the Bill of Rights, cannot be ignored. Constitutions are supposed to be prepared with much care and deliberation. It will not do to assume that such important instruments contain any idle or meaningless phrases. On the contrary, it must be presumed that every word was advisedly selected, inserted for a purpose, and intended to have its due weight in determining what organic principles have been established. In this state, then, taxes on occupations must be equal and uniform."

The constitution of the State of Washington provides as follows:

"all property in this state, not exempted under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property."

It will be observed that each and every provision contained in this constitution relative to taxation is expressly limited by its language to property taxes and can therefore have no possible application to license taxes under the view taken by the state courts that those taxes are not taxes on property.

The constitution of the state of Wyoming provides as follows:

"No tax shall be imposed without the consent of the people or their authorized representative. All taxation shall be equal and uniform. . . . . All property, except as in this constitution otherwise provided, shall be uniformlly assessed for taxation and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."

It will be observed that the constitutional re-

quirement of equality and uniformity in Wyoming, as in South Dakota, applies to all taxation, while the provision requiring taxes to be assessed according to value is expressly limited to property taxes. There is therefore nothing in the constitution to prevent the exaction of license taxes provided they are equal and uniform.

In the case of State vs. Willingham, 9 Wyo. 290; 62 Pac. 797, a city ordinance was attacked on the ground that the license tax required was not uniform and was therefore in conflict with the constitution. The court reviewed the provisions of the ordinance and held that the tax imposed was in fact a uniform tax and satisfied the constitutional provision.

The constitution of the state of Wisconsin provides as follows:

> "The rule of taxation shall be uniform and taxes shall be levied upon all property as the legislature shall prescribe."

This constitutional provision is rather indefinite. Its effect was considered by the Supreme Court of Wisconsin in the following cases: Fire Department of Milwaukee v. Holvanstein, 16 Wis. 136; Morrill v. State, 38 Wis. 428; State v. Whitcom, 122 Wis. 110; 99 N. W. 468.

In the case of Fire Department of Wilwaukee v. Halvanstein, the court passed upon the validity of a law requiring foreign insurance companies to pay a per cent. of their premiums for the benefit of the

fire departments of some of the cities. It was contended that this was a tax and void since it lacked uniformity. But the Court held that the exaction was not a tax but a fee exacted by the state in the exercise of its police power and that the law was no more than a police regulation. The court say: "Nor is the requirement an exercise of the power of taxation as to the companies, but only a proper exercise of the police power inherent in the sovereignty of the state."

The decision in the case of Morill v. State relates to the validity of an act of the state legislature requiring hawkers and peddlers to take out a license and pay a fee therefor. It was claimed that this was an exercise of the taxing power and that for that reason the fee must be uniform. The court however held that the legislature had the authority under the police power to prohibit hawking altogether, and had the undoubted power to regulate its exercise, because hawking and peddling were regarded as unsavory lines of business. It was accordingly held that the act in question was enacted under the police power for the purpose of regulation and was not governed by the constitutional inhibitions relating to taxation. After quoting from Jacob's Law Dictionary, where hawkers are defined as deceitful fellows etc., and making the statement that it was not the intention to cast any reflection upon the parties before the court, in view of the fact that many honest men were in the business of peddling,

the court say: "but with this disclaimer we must be permitted to add that undoubtedly resort is often had to this business for the sole purpose of obtaining admittance, which could not otherwise be obtained into private dwelling houses in furtherance of some criminal or unlawful object. This is another reason where the restriction or regulation of the buisness is an exercise of police power." This case was afterwards appealed to the Supreme Court of the United States as reported in the 154 U. S. 626. The judgment of the Supreme Court of Wisconsin was reversed. The Supreme Court of the United States do not discuss the case in the opinion any further than to say it was reversed on the authority of Welton v. State.

The decision in the case of State v. Whitcom deals with the validity of an act passed by the Wisconsin legislature requiring peddlers to procure a license and pay a fee therefor. Veterans of the Civil War and a number of others were exempted from the operation of the act. The court referred to two former cases decided by it, which leave the question as to whether a license tax could be exacted under the provisions of the Wisconsin Constitution in doubt and in view of the fact that that matter had not been argued in this case and the further fact that an expression on it was not necessary to the decision, the court refused to pass on it.

It was held that it was immaterial whether the license fee required under this law were viewed as

a tax or an exaction under the police power, as in either event the law would be void. If viewed as a tax it could not be sustained unless it was uniform upon the same class of subjects. If viewed as an exaction under the police power, it could not be sustained since it denied the equal protection of the laws, even though its object was to protect the public against irresponsible and deceitful traders. In the course of the opinion the courts say: "In considering the exemptions or partially disabled veterans of the civil war a quite unanswerable question arises, why, whether for purpose of taxation of police, they should be exempted any more than equally disabled veterans of other wars." And further on in the opinion it is said: "It seems neither necessary nor wise to carry further a critical anlysis of this statute. We have pointed out several respects in which it fails to impose its penalties upon persons not distinguishable from the appellant by any ligitimate classification. It therefore denies him the equal protection to which, both by Federal and State constitutions he is entitled, and cannot be valid as against him whether its purpose be taxation or regulation of conduct."

None of the other state constitutions contains a provision at all similar to the provision contained in the organic law of Alaska. A review of the various constitutional provisions limiting the power of taxation and the decisions thereunder discloses the fact that the courts have construed these provisions

just as they were written. In many of the state constitutions the provision relating to uniformity is not by its terms limited to property taxes, but like the Alaska provision is so worded as to apply to all taxation alike, and wherever such is the case it will be observed that the courts have generally, if not universally, held that the provision related to all taxation regardless of the character of the tax and that license taxes in order to be valid must be uniform in compliance with the constitutional provision.

It will be noted that no state constitution contains a provision similar to that found in the Alaska Organic Law providing that "all taxes" must be assessed according to value. The provisions in all the state constitutions requiring assessment according to value are expressly by their terms limited to taxes on property, and being so limited, the provisions can not and do not become material in discussing the validity of a license tax. But in the case of these provisions the courts also have given them effect according to, and construed them in accordance with, the exact language employed. While the language employed differs more or less in each case all these provisions provide substantially that property taxes shall be levied according to the value of the property taxed. And wherever a provision of this character exists the courts have held that the power of the legislature in connection with the assessment of property taxes is limited to taxes assessed according to value. That is to say, all specific property

taxes are done away with and such taxes are in all cases required to be ad valorem.

Since the decisions of the various state courts under these varying constitutional provisions do no more nor less than construe these provisions in accordance with the exact language employed, they do not and can not furnish any authority under which a construction can be placed upon the provisions of the Alaska Organic Act, which is not in accordance with its exact language. The Organic Law of Alaska provides that "all taxes" shall be uniform upon the same class of subjects. In this respect it is similar to the organic law of many of the states. The provision applies to all taxes. No distinction is made between license taxes and property taxes. It refers to "all taxes," that is to say, each and every kind of a tax and since a license tax is a tax, it must, in order to be valid, conform to the requirement of uniformity, and this is in accord with the decisions of the state courts rendered under similar constitutional provisions. But the provision in the Alaska Organic Act does not stop here, it requires more than uniformity. The language is, "all taxes shall be uniform upon the same class of subjects and the assessments shall be according to the actual value thereof. Under this provision then all taxes must be based upon an assessment and this assessment must be according to the actual value of the thing which is the subject of taxation. No state constitution contains the provision that all taxes must be

assessed according to the actual value of the thing taxed. This provision is peculiar to the Alaska Organic Law. Many state constitutions provide that all property taxes shall be levied according to actual value, but none, that *all* taxes shall be so levied, or that any tax, other than property taxes, shall be so levied, ~~or that any tax, other than property taxes, shall be so levied.~~ Apply the rule of decision applied by the state courts under the provision that all taxes must be uniform to the provision in the Alaska Organic Law. It follows that all taxes which are not assessed according to the actual value of the thing taxed are void, for as was pointed out in discussing uniformity clauses, license taxes are taxes, and being taxes are embraced within the term "all taxes" which is at once the most comprehensive and the most all inclusive of any term that Congress could have employed. If this language does not include license taxes, it is difficult to conceive of any language that would have been broad enough to include them. The statement contained in the Alaska Organic Act is equivalent to the statement that no tax shall be collected which is not uniform upon the same class of subjects, and which has not been assessed according to the actual value of the thing taxed, and since no tax, except an ad valorem property tax, can conform to these provisions that is the only tax that can be levied and collected under the Alaska Organic Law. It may here be added that the ad valorem system of taxation is the only safe, reasonable

and just system. Under it property is taxed and not the use of it. Unlike the license tax system, it does not place a premium upon idleness at the expense of industry and where it is levied with uniformity it distributes the burden of taxation equally and fairly.

It is urged that the provision requiring assessment according to value can not have been intended to apply to license taxes because these taxes can not be assessed according to value. It is true that license taxes cannot be assessed according to value, but it does not follow that for this reason they can be levied under a provision in the Organic Law requiring "all taxes" to be assessed according to value. It simply follows that license taxes can not be imposed. To contend otherwise leads to the most ridiculous conclusions for if license taxes can be assessed under this provision for the reason that its terms are such that a license tax can not conform to it, then it must follow that any tax can be assessed which is of such character that it can not conform to the requirements of the provision and can not be brought within its terms.

A specific property tax which differs from a license tax only in that it is a specific tax on property whereas the latter is a specific tax on occupations, can not be made to conform to the requirements of this provision, for while it is a tax on property it is a tax of so much per article without reference to the value of the article, just as an occupation tax is a tax of so much on a given occupation without ref-

erence to the value of the occupation. It is this that makes it a specific tax. If a specific tax were made to conform to the constitutional requirement so as to be assessed according to value, it would cease to be a specific tax and become an ad valorem tax. No specific property tax therefor can conform to this requirement. Hence, if the provision is to be so construed as not to apply to taxes that can not be made to conform to it, specific property taxes are not within its terms and can be levied notwithstanding a provision that "all taxes" must be according to value.

What is said of specific property taxes is true of each and every kind of a tax, except an ad valorem property tax, for no tax except an ad valorem tax is assessed according to value. If therefore all kinds of taxes that can not be made to conform to this provision are to be considered as not coming within it and are to be allowed notwithstanding the fact that they are not assessed according to value, then any kind of a tax whatsoever, be its character what it may, may be levied notwithstanding the fact that it is not assessed according to value. That is to say, since no tax, except an ad valorem property tax, can be levied according to value, specific property taxes, license taxes and every other conceivable kind of a tax may be levied notwithstanding the constitutional provision that all taxes must be levied according to value, if it be conceded that the requirement of assessment according to value was not intended to apply

to taxes that are of such a character that they can not be made to conform to it. The adoption of this view therefore would entirely destroy the effect of the provision. It would be equivalent to saying that a provision that taxes must be assessed according to value applies only to ad valorem property taxes for these are the only taxes that can be made to conform to this provision. All taxes, if this contention is regarded as sound except ad valorem property taxes can of course be levied because these can not conform to the provision and ad valorem property taxes can of course be levied because these can not exist without conforming to the provision, so the provision becomes entirely meaningless and is left without any effect whatsoever.

The idea that the term "all taxes" does not include license taxes finds its origin in a wrong conception of what a license tax really is. It results from a confusion of license fees exacted under the police power with license taxes. There is nothing occult or mysterious about a license tax. It is not different from any other kind of a tax, it is simply a specific tax upon occupation, just as a specific tax on property is a specific tax on property. Money exactions under the police power may be allusive and peculiar in character because of the elasticity of the police power, but these characteristics do not apply to license taxes.

Viewed therefor from the standpoint, either of reason or authority, the term "all taxes" must be

held to include license taxes and since the tax sought to be collected in this proceeding is not uniform upon the same class of subjects, is not based upon any assessment whatsoever and is not assessed according to value, it cannot be sustained under the provision in the Organic Act.

But the learned trial judge expressed the opinion that express authority had been conferred upon the legislature to exact a license tax. If such express authority exists it must exist because of the following provision in the organic act:

> "That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes," approved January twenty-seven, nineten hundred and five, and the several acts amendatory thereof: Provided further, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

In the first place it will be observed that this provision does not contain a grant of power. The provision taken as a whole is a limitation upon the power of the legislature. Congress had enacted a law with a view of collecting revenue to meet the expense of the general government in administering the law in the Territory. It was deemed desirable to keep this law in force accordingly a provision was inserted against its repeal by the Territorial legislature. But in order that this provision might not be given a broader construction than was intended for it, it was provided:

> "That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses."

The clause does not in any sense contain a grant of powers but is a mere statement inserted to prevent a provision containing a limitation upon the powers of the legislature from receiving too broad a construction.

Viewed, however, as an express grant of powers this clause does not confer the power to impose a license tax. A grant of power to require license authorizes the exaction of licenses under the police power for the purpose of regulation, but does not authorize the exaction of license taxes under the taxing power. The right to require the latter exists if it exists at all under the taxing power and must be exercised in subordination to the limitations placed upon that power by the organic law, the form-

er exists under the police power and is controlled by the limitations placed upon that power by the organic law, without any reference whatsoever to the limitation relating to the exercise of the taxing power. The right to require a license and the right to impose a license tax are separate and distinct rights, bearing no relation to one another; and a grant of the former does not include the latter. Upon this the authorities are agreed.

Sunset Telephone and Telegraph Co. v. City of Medford 115 Fed. 202.
In re Laundry Licenses 22 Fed. 701.
Clark vs. Brunswick, 43 N. J. Law 175
Cache County v. Jensen 61 Pac. 303.
State v. Smith 35 Atl. 506 (Conn.) 52 Am. St. Rep. 301.

The case of the Sunset Telephone and Telegraph Company v. City of Medford arose before Judge Bellinger. The charter of the City of Medford, Oregon provided as follows:

> "The city council shall have power to license, regulate or prohibit telegraph and telephone companies using the roads, streets, or alleys of the city and road district, and to fix the compensation which such companies shall annually pay to the city for such license or privilege. But no license shall grant an exclusive right to any such company."
>
> Under this provision in the charter the city passed an ordinance requiring telephone

companies to pay one hundred ($100.00) dollars per annum as a license fee. The court held that the fee was so large that it was obviously a revenue provision and that it was therefore not within the authority conferred on the city by its charter. In passing upon the ordinance the court say:

"The ordinance complained of provides that no person shall engage in the telephone business, or place in or occupy any of the streets with its poles and wires, without paying, for an annual license so to do, the sum of $100, and, when this sum is paid, the city recorder shall issue a license to the person, authorizing and permitting said person or company to engage in the telephone business within said city for the period of one year; that the person or company paying said license fee, during the year for which they have paid such license, shall have a right to occupy the streets and alleys with his or its poles and wires, etc. This is a revenue provision, and is not within the authority conferred upon the city by its charter. 'The power to license, as a means of regulating a business implies the power to charge a fee therefor sufficient to defray the expense of issuing the license, and to compensate the city for any expense incurred in maintaining such regulation. Whenever it is manifest that the fee for the license is substantially in excess of what it should

be, it will be considered a tax, and the ordinance imposing it void.' Laundry License Case (D. C.) 22 Fed. 701. If the city has authority, under section 102 of the charter, to fix the compensation which shall be annually paid for such license or privilege to use the roads and streets of the city, then the city might have required the payment of the sum fixed by the ordinance for such use. But it did not do this. From the averments of the bill, it appears that the complainant has the right to use the streets of the city, by permission of its lawfully appointed officers. If so, the city cannot add new conditions to the grant after the company has accepted it and established its plant. If by the power to fix compensation is meant the compensation that the city is to receive for the license regulation, the case is within the rule of the Laundry License Case (D. C.) 22 Fed. 701, and the compensation to be fixed must not go beyond the expense of issuing the license and maintaining the license regulation. In short, the city cannot add to the conditions upon which the right to use the streets was granted to the complainent, and while it may exact compensation for the license, it cannot, under the power given in its charter, make such compensation a matter of revenue."

The case of In Re Laundry License arose in Oregon. A city ordinance of the City of Portland

required the proprietors of wash houses to pay a quarterly fee of five dollars, making an annual fee of twenty dollars. The charter of the city of Portland authorized the city to regulate wash houses, laundries, and the like, and another subdivision in the charter authorized the city to license and regulate all such callings, trades and employments not prohibited by law, "as the public good may require." The question before the court was whether these provisions in the charter authorized the license fee of twenty dollars per annum exacted from the proprietors of wash houses. The matter arose on a petition for a writ of habeas corpus. The petitioner had been convicted for violation of the Portland ordinance and, the case arose before Judge Deady. Judge Deady held that the city had under the provision quoted the power to license laundries, but that a license could be exacted only in connection with the exercise of the power to regulate, and that it could not be used as a pretense for raising revenue. The Court held that one dollar per year would be ample to re-imburse the city for registering a license and that the fee of twenty dollars must be regarded as a revenue measure and therefore void.

The case of Clark v. New Brunswick arose in the State of New Jersey. The city charter of the city of New Brunswick empowered the city council to pass ordinances to license and regulate cartmen, hawkers, peddlers, auctioneers, pawnbrokers, junk and shop keepers and others. Under this grant of

powers the city council of New Brunswick passed a license law very similar to the act passed by the Territorial Legislature. The act was held void on the ground that the power to exact a license tax was not conferred upon the city. In passing upon this matter, the court, speaking through Judge Van Sychel say:

> "Under such grant of power it has been repeatedly held in this state, the right of taxation for revenue purposes is not conferred. It is purely a police power and must be exercised for the purpose of regulation. The city may be incidently benefited by the imposition of fines and penalties, but they must be reasonable and appropriate to the regulation of the various pursuits enumerated. Any attempt to establish a fiscal scheme under the grant is without authority by law." Again the court quoting with approval from a former decision rendered by the Supreme Court of New Jersey say: "When authority is given to require the possession of a license as a condition for selling, a reasonable fee, to cover probable expense can be demanded, but the exaction of sums in excess of such expenses and graduated by the amount of business done can be nothing else than a tax upon such business."

The case of Cache County v. Jensen arose in the State of Utah. The laws of the state authorized counties to require licenses for the purpose of reg-

ulation and revenue. Cache County imposed a license on those ~~grounds~~ engaged in herding sheep. The amount of the license fee exacted depended upon the number of sheep and was so large that it was evidently intended as a means of raising revenue. The ordinance requiring the license did not provide for any regulation so that it was on its face a revenue measure solely.

The Supreme Court of Utah held that under a grant of powers to the counties empowering them to require a license for the purpose of regulation and revenue, the counties had no right to require a license for the purpose of revenue only; that the grant merely empowered the counties to license for the purpose of regulation and that if revenue resulted incidently this was permissable.

The Court say: "So a right to license a business or occupation does not imply a right to exact a tax merely for revenue and where the object is revenue the power to license for that purpose must be conferred in unequivocal terms. "License" in general implies privilege and regulation and the imposition of it falls within the police power of the state.

In the case of State v. Smith, the court had before it an ordinance of the City of Bridgeport. The charter of the town of Bridgeport authorized the City of Bridgeport to license cartmen, truckmen, hackmen, butchers, bakers, petty grocers, hucksters and common victualers under such restrictions and

limitations as said common council might deem necessary and proper to the health of the city, and to make other ordinances relative "to any and all subjects which shall be deemed necessary and proper for the protection and preservation of the lives of the citizens." The city council under this grant of power enacted an ordinance requiring a license from all milkmen. The court held that this ordinance was not authorized, under the general welfare clause, nor under the provision above referred to and was therefore void. The court say:

> "The right to license the pursuit of a lawful business, which as usually carried on does not endanger the public health or safety, and thus to limit the number of those who may engage in it, is one of the highest powers of sovereignity. When conferred upon a municipal corporation, the grant can not be extended by any doubtful implication."

For the various reasons assigned the judgment of the lower court should be reversed. The act of the Legislature creates no civil liability, nor is a civil remedy provided and the act itself is void in that it requires the doing of that which is impossible and is so indefinite and uncertain in its provisions that it can neither be complied with nor enforced; in that it confers upon the court or Judge arbitrary power to deny to those engaged in useful occupations the right of following such occupations, and to deny persons possessed of property the right to use and

enjoy such property, in violation of the provisions of the federal constitution; in that under the provisions of the act, those whose incomes are derived from mining and exceed $5000 are discriminated against in favor of those whose incomes are derived from some other source and those whose incomes derived from mining are less than $5000, in violation of the provisions of the federal constitution; and in that it is not uniform upon the same class of subjects, is not based upon an assessment and is not assessed according to value, in violation of the provisions of the Organic Act of the Territory of Alaska in that regard.

Respectively submitted,

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff in Error.

CURTIS H. LINDLEY,
of Counsel.